No. 600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, AND DEED OF KATHARINE S. JOHNSTON AND DECREE OF SUPERIOR COURT OF FORSYTH COUNTY, N. C., ETC.,
Respondent.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATES ADMINISTRATION, INC., ADMINISTRATOR ESTATE OF ZACHARY SMITH REYNOLDS, DECEASED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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INDEX.

INDEX—Continued

INDEX—Continued

INDEX—Continued

CITATIONS

CITATIONS—Continued

CITATIONS—Continued

TEXT BOOKS, ETC.:

CITATIONS—Continued

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

As stated in Petitioner's Brief the findings and opinion of the Board of Tax Appeals are contained in

pages 1 to 31 of the printed record, and the case is reported in 42 B. T. A. 145. It was reviewed by the entire Board (R. p. 31), with no dissent. The affirming opinion of the Circuit Court of Appeals, likewise unanimous, is contained in pages 42-54 of the Record, and is reported in 121 F. 2d 307.

QUESTIONS PRESENTED

These are two, all other contentions previously made before the Board having been abandoned.

1. Subsection (a) of Section 302 of the Estate Tax Law was amended in the Revenue Law of 1926 by omitting the previous qualifying additions that an interest of decedent, to be includible in his gross estate, must be of such a nature that after his death it should be subject to the payment of the charges against his estate and the expenses of its administration, and subject to distribution as part of his estate; leaving the subsection to read:

> "Section 302(a). To the extent of the interest therein of the decedent at the time of his death."

It is claimed by Petitioner, relying principally upon some very general statements made in opinions of this Court dealing with the constitutional basis for taxation and with other provisions in the revenue laws, that the effect of omitting the above qualifying words, in such reenactment, was to vastly extend the scope of Section 302 and to make includible the value of property over which a decedent had a power of testamentary appointment (which was not exercised); and that the decedent (Zachary Smith Reynolds) in the present case had rights equivalent to substantial ownership; so that the entire value of the property over which he was given powers of testamentary appointment by his parents in

the three trusts involved should be included in ascertaining estate tax due by reason of his death.

2. It is further claimed by Petitioner that the principle of *Lyeth vs. Hoey*, 305 U. S. 188, requires that some part of the properties held in the three trusts involved in this case should be considered as having passed by exercise of a general power of appointment, because although the attempted appointment of Zachary Smith Reynolds while a minor and a resident of North Carolina has been found to be invalid, yet something must have been allowed or paid under the compromise ratified by the judgments of the North Carolina and Maryland Courts, in compromise of claims of those who would have been appointees under such attempted will.

Both of these claims are disputed by Respondents upon various grounds, which will be discussed in our argument.

STATEMENT

The statement of facts in Petitioner's brief is fairly complete, although the statements that the income from the trusts was to be devoted to decedent's support, maintenance and education until he reached twenty-one; and that in default of his exercise of his power of testamentary appointment and lack of descendants, the property was to go "to his brother and sisters and their issue per stirpes," are much too broad; but we are dealing with this in the subsection of our argument devoted to the question of the nature of the rights which the decedent had at the time of his death. So, too, the statement of additional facts with respect to the second question involved in this case is incorrect in stating that thirty-seven and a half per cent of the

estate was allotted to decedent's brother and sisters, but this also is covered in our subsequent discussion.

We desire however to call special attention to the following facts.

The power of appointment conferred by all three of the trust instruments was a power of testamentary appointment only, and did not authorize the decedent to make any disposition of any part of the three estates in his lifetime or by deed.

In all three of the instruments, subject to such power of testamentary appointment, the share in the trust estate was limited over upon his death under twenty-eight (in the case of Mrs. Johnston's two trusts, in case of his death at any time) upon limitations which provide for every possible event, so that all future interests were completely and minutely disposed of, subject only to the power of testamentary appointment conferred upon him under all three of the trusts.

We desire also to call attention to the fact that the present case has nothing in common with cases involving the question of when a decedent has created a trust or a limitation to take effect in possession or enjoyment at or after his death under Section 302(c). The trusts now in question were created by the parents of Zachary Smith Reynolds while he was but a young child. It may seem unnecessary to accentuate this fact; but we do so because many of the cases cited in Petitioner's brief are cases arising under that section, in which the question was whether a Settlor by a transfer made in his lifetime had retained such substantial rights as to make the transfer one intended to take effect in possession or enjoyment at or after his death.

SUMMARY OF ARGUMENT

We shall of course confine our argument to the two contentions made in Petitioner's brief, without noticing or mentioning the other questions which have been raised during the long pendency of this case but which are now abandoned; and in dealing with these two questions we shall arrange our argument under the following points or headings:

I. That Section 302(a) of the Revenue Act of 1926 (I. R. C. Sect. 811(a)) does not require the inclusion of property over which a decedent had a general power of testamentary appointment, or extend the scope of the section to cases where a court might think that decedent's rights were substantially as beneficial in their nature as outright ownership; nor had the decedent in the present case rights which in any sense can be said to be equivalent to substantial ownership.

1. The nature of the contention so made by Petitioner, or the issue before the Court.

2. The novelty of such a contention, which is totally contrary to the practice of over fifteen years since the Act of 1926 was passed. Such long established practice and administrative construction is alone a sufficient reason for rejecting Petitioner's present claim.

3. That any such contention is foreclosed by the decisions of this Court in *United States vs. Field*, 255 U. S. 257; *Porter vs. Commissioner*, 288 U. S. 436, and other cases. A power of testamentary appointment is not an estate or interest in the property subject to such power.

4. That the tax imposed by the law in question is primarily an estate tax (on the estates of decedents), and that the "interest" of decedent referred to in Subsection (a) means an interest in property owned by the decedent such as would normally constitute part of a decedent's estate.

5. That general expressions in the opinions of this Court, dealing with matters not related to the present question of statutory construction, are not to be taken as applicable to the construction of the statute now in question.

6. That the fact that Congress by the Revenue Act of 1926 in making the change in the wording of Section 302(a) which is relied on as having effected the hitherto unsuspected result now contended for, reenacted unchanged and without explanation the provisions of Section 302(f), taxing the *exercise* of a power of testamentary appointment, does indicate clearly that no such result as is now contended for was intended or contemplated.

7. That the decedent (Zachary Smith Reynolds) did not have rights under any of the three trusts involved which can be said to be substantially equivalent to ownership.

8. That to hold that the scope of Section 302(a) was broadened so as to include all cases in which a court may think that the rights of decedent were substantially as beneficial as outright ownership, would put the determination of such cases in a legal fog; and that if Congress had intended any such sweeping change it would have made some provision for defining or determining what the nature of the

interest in property not belonging to the decedent should be to justify its inclusion.

9. That the attempt to tax as part of a decedent's estate, the passage of title due to his death under limitations in trust settlements made before any law attempting to tax such devolutions was passed, would involve serious constitutional questions as to the validity of such an attempt, and that the existence of such questions is a sufficient reason for not assuming that any such result was intended by Congress, by the amendment of the law now invoked.

II. That the principle of Lyeth vs. Hoey, 305 U. S. 188, does not require that any part of the property held in these trusts should be included in determining estate tax, because of any disposition made of it in pursuance of the compromise made and ratified by the North Carolina and Maryland Courts.

1. Difference between income tax (accruing on date of receipt) and estate tax (accruing on date of death), in this respect.

2. That the compromise was made and effected by the judgments of the North Carolina Court and the Maryland Court, and that both Courts in ratifying the compromise expressly decided that the attempted appointment was invalid.

3. That the attempted New York will was relatively not of importance as a basis for the compromise.

4. That the thirty-seven and a half per cent compromise share in the R. J. Reynolds Estate, of which the surviving brother and sisters were beneficiaries

(and which it is now claimed was allotted in part in satisfaction of their claims under the New York will), was allotted to be added to the shares already held in trust for them under their father's will; that is, as it would have passed under the limitations of his will in default of appointment and issue; and hence could not have been allotted in whole or in part in satisfaction of any claim under the New York will, which would have appointed the property to his brother and sisters absolutely.

5. That the findings of the Board of Tax Appeals are as full and specific as the nature of the case admits of; and that to remand the case to the Board for a finding of to what per cent the attempted appointment by the New York will figured in the compromise finally arrived at, would require of the Board a task impossible of execution.

ARGUMENT

I

THAT SECTION 302(a) OF THE REVENUE ACT OF 1926 (I. R. C. SECT. 811(a)) DOES NOT REQUIRE THE INCLUSION OF PROPERTY OVER WHICH A DECEDENT HAD A GENERAL POWER OF TESTAMENTARY APPOINTMENT, OR EXTEND THE SCOPE OF THE SECTION TO CASES WHERE A COURT MIGHT THINK THAT DECEDENT'S RIGHTS WERE SUBSTANTIALLY AS BENEFICIAL IN THEIR NATURE AS OUTRIGHT OWNERSHIP; NOR HAD THE DECEDENT IN THE PRESENT CASE RIGHTS WHICH IN ANY SENSE CAN BE SAID TO BE EQUIVALENT TO SUBSTANTIAL OWNERSHIP.

POINTS

1. The nature of the contention advanced by Petitioner, or the issue before the Court.

Petitioner's contention may be resolved into two parts, both of which would have to be determined in Petitioner's favor, to justify a reversal in the present case, and these two contentions may be expressed or summarily explained as follows.

In the first place, it is contended that because Congress omitted in the Revenue Law of 1926 the previous qualifying words in Section 302(a) (which required that an interest to be included must be such as after the decedent's death is "subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate"); that the result was to vastly broaden the scope of Sub-section (a) so as to make an unexercised power of testamentary appointment such an interest. There was it may be noted abundant reason for repealing these additional qualifications, without supposing that Congress intended thereby to so vastly broaden the scope of the subsection as to include unexercised powers of appointment. They made the taxability of real estate depend upon minor differences in the laws of the different States, and resulted in the decision in *Crooks vs. Harrelson*, 282 U. S. 55, making the taxability of real estate dependent upon such insignificant considerations as whether the law of the State made administration expenses a charge on real estate if the personalty were insufficient to provide for the same. They also caused much similar difficulty in applying the estate tax law to community property under the different provisions of the States which recognized that species of property.

In the second place, the Commissioner claims that the rights which the decedent possessed at the time of his death (including especially power of testamentary appointment) were such that he had all the "substantial attributes of ownership" and that he must therefore be treated as an owner of the property for the purposes of Subsection (a).

In the succeeding subsections of this brief a number of answers to these contentions of the Petitioner are set forth, each of which, it is submitted, is separately and independently sufficient, so that if any one of the grounds advanced are sustained, it is destructive of the claim of Petitioner under this Item.

2. The novelty of Petitioner's contention, which is totally contrary to the practice of over fifteen years since the Act of 1926 was passed. Such long continued practice and administrative construction is alone a sufficient reason for rejecting Petitioner's present claim.

Perhaps the extreme novelty of the contention now advanced is its most striking feature.

During the period of over fifteen years which has elapsed since the enactment of the Revenue Law of 1926, no one has ever suggested even the possibility of such a contention before.

No reported case, of any Court or of the Board of Tax Appeals, and no ruling by the Department and no claim heretofore asserted by the Commissioner contains any intimation or suggestion of a possibility of such a contention or claim.

It presupposes that this Court, other courts, the Attorney General's office, the Commissioner and his counsel and advisers, were all engaged in a futile inquiry in cases such as *Helvering vs. Grinnell,* 294 U.

S. 153 (1935); *Morgan vs. Comm'r,* 309 U. S. 78 (1940); the case in the Fourth Circuit of *Legg's Est. vs. Comm'r,* 114 F. 2d 760 (1940); the case in the Third Circuit followed by the Fourth Circuit in the Legg case; viz, *Rothensies vs. Fidelity Trust Co.,* 112 F. 2d 758 (1940); all of which arose under the Act of 1926 or subsequent re-enactments and in all of which the donee of a general testamentary power had also the beneficial life interest in the property subject to the power. All of these cases should have been decided, if the contention now made were well founded, upon the simple ground that whether taxable or not under Section 302(f) as property disposed of by the exercise of a general power, the property in question was taxable under Section 302(a) because subject to such a power, and this would have resulted in a contrary result to that reached, except in the *Morgan* case, where the property in question was held taxable under Section 302(f).

In addition to the cases specially cited above there have been many other cases in the courts and before the Board, turning upon the question of whether a general power of testamentary appointment had been exercised, which are collected and cited in the general tax services such as C.C.H. 1941, Inheritance, etc., Tax Service (Fed.), para. 3468, which we have not thought it necessary to examine and classify and which were similarly decided. Nor has such a claim been asserted by the Commissioner heretofore in his Regulations or in the Departmental Rulings, nor so far as we are informed ever advanced or suggested by any text writer or contributor to the law magazines, before it was raised in the present case upon appeal to the C.C.A.

In the Commissioner's petition for certiorari in the present case (p. 10) the principal ground given why this Court should take the case up is alleged to be because of the similarity of the trusts involved in this case to "*innumerable* other trusts, in which property of *incalculable* value has been placed, the taxability of which will be affected by the decision here." (Italics supplied.)

In Petitioner's present brief (p. 19) it is stated that trust provisions of the type involved in this case, combining a life estate, testamentary power of disposition and a gift over provision in favor of the life beneficiary's children and next of kin in the event of non-exercise of the power of appointment, are in constant use.

Within less than a year after the passage of the Act of 1926 the Commissioner promulgated a new edition of the Estate Tax Regulations (No. 70, 1926 Ed., effective January 1, 1927) substantially identical with Regulations 80, which have since been continued in force and from which Articles 2, 13 and 24 are printed in Petitioner's present brief. They expressly provided (Art. 13, App. to Pet. Brief, p. 63) that it was designed by the foregoing provision of the statute (*i. e.*, by subsection a) to include in the gross estate all *property of the decedent* which was in the decedent at the time of his death; and that while the value of a vested remainder should be included in the gross estate, *nothing should be included on account of a contingent remainder in case the contingency does not happen in the lifetime of the decedent and the interest consequently lapses at his death*, and further that *nothing should be included on account of an interest or an estate limited for the life of the decedent*. And Art. 24 with

reference to powers of appointment (Do. p. 64) further provides that *only property passing under a general power should be included.* (Italics supplied.)

In neither case is the generality of the statement qualified by any proviso that if there be both a life interest and a general power of testamentary appointment, then the contrary of what the Regulations state may be true.

Again in 1937 Article 2 was amended so as to read as set forth on p. 61 of Petitioner's brief; and as so amended it indicates even more clearly than before that Subsection (a) was intended to cover the ordinary case of property of the decedent passing by will or under the intestate laws; as it first states that "in addition to property passing under a will or the intestate laws," the estate should include certain other kinds of properties, which it enumerates and which comprise the transfers reached by Subsection (b), (c), etc., following Subsection (a).

In Petitioner's brief (Note 30, p. 50) it is argued that since these provisions in the 1937 Regulations were not in effect at the time of decedent's death, that therefore they have no application in the present case. But the Regulation interpreted Section 302(a) of the Act of 1926, and the form assumed in the 1937 Regulations (and only since altered by Regulations adopted in the last few days) represents the deliberate judgment of the Commissioner after ten years' practice under the Act and ample time to consider its scope and application.

Recent decisions of this Court attach even more importance to the Regulations promulgated by the Commissioner; and tend to minimize the distinction be-

tween interpretative regulations and administrative ones.

Helvering vs. Reynolds, 313 U. S. 428.

Petitioner's Brief (p. 49) calls attention to the fact that some of these statements have been omitted or altered in phraseology in the new Treasury Regulations No. 105 (from which he prints in his appendix, p. 59-61, Sect. 81.3 and 81.24 as being the present Regulations applicable). These new Regulations, we are informed by the Solicitor General, were promulgated as recently as February 18, 1942 and were expected to be published on February 25th; but at this writing copies are not yet available. In so far however as they make any change in the provisions which have uniformly appeared in the Regulations since 1926 and 1937 and to which we have referred, such changes must have been made becaues of the pendency of the present case.

By the Act of 1932, Section 803, Congress amended Subsection 302(f) so as to inclnde certain cases which were thought not to be covered by the existing text, which amendment would have been unnecessary if powers of appointment had been considered to be included in Section 302(a), whether exercised or not. Other parts of Section 302 have been from time to time amended, including the introductory paragraph preceding Subsection 302(a) (Act of 1934, Section 404), leaving the phraseology now in question unaltered.

That contemporaneous and long established practice and usage under a statute is of great force in determining its meaning, is a proposition sustained by decisions of practically all the courts, and a great number of cases to that effect are collected in 59 *Corp. Jur.* "*Statutes*," Section 607 and 608, pp. 1022, etc.

Or as stated by this Court in a case involving the interpretation of the bankruptcy law:

> "Only compelling language in the statute itself would warrant a rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance."
>
> *Maynard vs. Elliott*, 283 U. S. 273, 277 (1931);
>
> *Cf. Dismuke vs. U. S.*, 297 U. S. 167, 174 (1936).

Many earlier decisions of this Court to the same effect are digested and cited in U. S. Supreme Court Digest, 1929, Vol. 8, "Statutes," Sections 151, 152, 155, etc.

The administrative construction followed by the Commissioner and adopted or indicated in his Regulations, has also a peculiar force in the case of Federal Tax Statutes reenacted after such executive construction by the Commissioner or officers charged with its execution. We will not undertake to cite the great number of cases dealing with this question (most of them are collected in 1 Paul and Mertens, Law of Federal Income Taxation at Section 3.19). Recent cases in which this rule has been applied include:

> *Helvering vs. Reynolds Co.*, 306 U. S. 110, 116;
>
> *Morgan vs. Comm'r*, 309 U. S. 78, 81;
>
> *Helvering vs. Oregon Mut. Life Ins. Co.*, 311 U. S. 267, 270;
>
> *Lang vs. Comm'r*, 304 U. S. 264, 268.

3. That any such contention is foreclosed by the decisions of this Court in United States vs. Field, 255 U. S. 257; Porter vs. Comm'r., 288 U. S. 436, and other cases. A power of testamentary appointment is not an estate or interest in the property subject to such power.

The *Field* case involved the question whether property passing by the exercise of such a power was included within the scope of Subsection (a), which at that time had not been amended by the omission of the qualifying words which were omitted in the Act of 1926. It was held that (p. 262, italics supplied):

> "The conditions expressed in clause (a) are to the effect that the *taxable estate* must be (1) *an interest of the decedent at the time of his death*, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause."

Subsection (1) of the above analysis it should be noted was the one requiring the existence of an interest of the decedent at the time of his death, a requirement which still exists notwithstanding the omission of those which are numbered at (2) and (3) in the above quotation.

The Court then proceeds to hold upon authorities cited that "the existence of the power does not of itself vest any estate in the donee" (p. 263), evidently mean-

ing that the first requirement of the section (which has not been repealed) was not gratified. It concludes (p. 264): "It follows that the interest in question, not having been property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a)."

The decision was therefore clearly based upon the ground that Mrs. Field (who incidentally was the equitable life beneficiary) did not have an estate or interest in the property at the time of her death, and also upon the ground that the other then existing requirements of Subsection (a) were not complied with.

U. S. vs. Field, 255 U. S. 257.

The argument that, because the case might have been decided upon the other ground alone, that therefore what the Court decided with respect to the nature of Mrs. Field's interest was pure dictum, assumes that when a Court decides a case upon two or more grounds, its conclusions are dicta because the case might have been decided upon one of the grounds alone. This would destroy the authority of such cases for any of the propositions decided; because if it were urged as a precedent for the other ground or grounds upon which it was based, it could equally be said that its decision as to such other grounds was not a precedent, but merely dictum, because the case might have been decided upon the first ground alone.

Such a view of the authority of precedent, and of the principles of *stare decisis*, is directly contrary to well settled authority, according to which, when there are two or more grounds upon which an appellate court may rest its decision, if it adopts both, the ruling

on neither is obiter and each is the judgment of the Court and of equal validity with the other.

> *Railroad Companies vs. Schutte*, 103 U. S. 118, 143;
> *Union Pac. Co. vs. Mason City Co.*, 199 U. S. 160, 166;
> *U. S. vs. Title Ins. Co.*, 265 U. S. 472, 486.

The *Porter* case in one respect at least is even more in point than the *Field* case; because it arose under the Revenue Act of 1926; that is to say, after Subsection (a) had been reduced to its present form. It was a case involving Section 302(d) of the Act of 1926 relating to transfers in trust with reservation of a right to change the beneficiary; and it was argued that Subsection (d) was limited by the provisions of Subsection (a), so that the amount taxable under (d) was only the interest therein of the decedent at the time of his death. In answering this contention this Court said (p. 442, italics supplied) that Subdivision (a) does not in any way refer to or purport to modify (d), and in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers, it cannot be said that if it stood alone Subsection (a) *would extend to the transfers brought into the gross estate by (d)*, citing the *Field* case as authority, and further pointing out the fact that Congress has progressively expanded the bases for taxation under the Act, and that comparison of the section with corresponding provisions of earlier Acts warrants the conclusion that (d) is not a mere specification of something covered by (a), *but that it covers something not included therein.*

> *Porter vs. Comm'r.*, 288 U. S. 436 (1933).

In his present brief Petitioner (p. 42, note 25) argues that the *Porter* case amounts to no more than dictum, and further suggests that particular doubt is thrown upon such dictum by the subsequent decision in the *Sanford* case. So far however from overruling or questioning any of the argument or decision in the *Porter* case that case is cited with approval at p. 43 of the opinion in the *Sanford* case, and with respect to abandoning its rulings in the *Porter* case it was said at p. 46 (italics supplied):

> "The Government does not suggest * * * that we should depart from our earlier rulings" (in the *Porter* and other cases) "and we think it clear that we should not do so * * * *because we are satisfied with the reasoning upon which they rest.*"
>
> *Sanford Est. vs. Comm'r.*, 308 U. S. 39, 46.

Again in *Wachovia Bank vs. Doughton*, 272 U. S. 567, in which the Court held that the North Carolina statute taxing general powers of testamentary appointment could not constitutionally apply to a power of appointment over property which had been settled and was held in trust in another State, this Court says in its opinion by Justice Brandeis (p. 575), citing the *Field* case, that "personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power."

And in *Crooks vs. Harrelson*, 282 U. S. 55, the opinion points out (pp. 58-59) that it was held in the *Field* case that the property in question was not taxable "because it was not her property at the time of her death," etc.

And again in *Burnet vs. Guggenheim*, 288 U. S. 280 (holding that a gift became complete when power of

revocation was surrendered), in the opinion by Justice Cardozo (p. 288), it is said that the *Field* case holds that under the revenue act involved the subject of a power created by another is not a part of the estate of the decedent to whom the power is committed. And on pp. 284-5, that the question was not one of legislative power, but of legislative intention.

The finding in the *Field* case that a general power of appointment does not vest an estate or interest in the donee under the terms of Subsection (a) has been cited and followed in numerous cases in the different Circuits (collected in Shepard's Notes) as, for instance, in the Fourth Circuit in the case of *Leser vs. Burnett*, 46 F. 2d 756, where it is said (p. 759), citing the *Field* case, that "whether the power be general or special it is well settled that the existence of the power does not of itself vest an estate in the donee, and that upon its exercise the appointee takes under the donor."

We submit also that the decisions in *Helvering v. Grinnell*, *Morgan vs. Comm'r.*, and the other decisions to which we have referred on p. 10 of this brief as showing the entire novelty of the present claim, are also authorities in support of the proposition that Subsection (a) as amended by the Act of 1926, does not include powers of testamentary appointment, even when coupled with a life or other interest, as "interests" of the decedent. They at least show that the Court assumed that they were not included; and are, we submit, of force as precedents on the question which we are discussing under this subheading, as necessarily assuming that the cases decided were not within Subsection (a).

4. That the tax imposed by the law in question is primarily an estate tax (on the estates of decedents), and that the "interest" of decedent referred to in Subsection (a) means an interest in property owned by the decedent such as would normally constitute part of a decedent's estate.

The word "estate" has different meanings, but when employed to mean the estate of a decedent it has a quite definite meaning and application (Century Dictionary, "particularly the property left at a man's death, as at his death his estate was of the value of half a million").

To include as part of a decedent's "estate" an interest in property which in the words of this Court in *May vs. Heiner*, 281 U. S. 238, 443 "is obliterated by that event" (*i. e.*; the death of the decedent whose estate is being taxed) would require very plain and unmistakable language to evidence such an intention.

And as further said in the opinion in the same case, quoting from *Reinecke v. Northern Trust Co.*, 278 U. S. 339:

> "In the light of the general purpose of the statute and the language of Sect. 401 explicitly imposing the tax on *net estates of decedents*" (italics ours) "we think it is at least doubtful whether the trusts or interests intended to be reached by this phrase 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Sect. 401. That doubt must be resolved in favor of the taxpayer."
>
> *May vs. Heiner*, 281 U. S. 238, 244.

"In the absence of a clear declaration it cannot be assumed that Congress intended insurance bought and paid for with the funds of another than the insured and not payable to the latter's estate, should be reckoned as part of such estate for purposes of taxation."

Lang vs. Comm'r, 304 U. S. 264, 270.

Accordingly it has been repeatedly held that the estate tax is a "tax on the act of the testator not on the receipt of property by the legatees" (*Ithaca Trust Co. vs. United States*, 279 U. S. 151, 155; *Cf. Y. M. C. A. vs. Davis*, 264 U. S. 47, 50; *Edwards vs. Slocum*, 264 U. S. 61, 62).

It is true that by adding special sections, for the most part dealing with what may be considered as methods of avoiding or evading the incidence of estate tax, some transfers which would not ordinarily be considered as transfers of property constituting part of a decedent's estate have been brought within the scope of the statute. But as pointed out by Judge Parker in his opinion below (R. pp. 48, 49) (quoting from the opinion of Judge Patterson in *Davis vs. U. S.*, 27 F. Supp. 698) these additions were made for the most part to meet decisions which had refused to extend the general language of the estate tax law to cover transfers which were not of property owned by a decedent and passing by will or intestacy. And, as we have already seen (*ante*, p. 12), this was the construction adopted by the Commissioner, especially in Article 2 of his regulations as expressed in the revision of 1937.

No case has been found or cited in which it has ever been heretofore decided that Section 302(a) extends to any rights of a decedent which would not normally constitute part of a decedent's "estate".

5. That general expressions in the opinions of this Court, dealing with matters not related to the present question of statutory construction, are not to be taken as applicable to the construction of the statute now in question.

The numerous cases cited by Petitioner as authority for his propositions as to substantial identity of powers of appointment with ownership; as to non-exercise of powers as being as much in the nature of a testamentary disposition as the exercise thereof; that the controlling tax event for purposes of the estate tax is shift of economic benefits due to the death of the decedent; are cited, for the most part, without discrimination or any indication of what the actual nature of the decision in the cases cited was; and are from cases in which this Court was dealing with the constitutional power to tax, or with the scope and meaning of other sections of the Act expressly making taxable transfers in which substantial control and power of disposition was retained by the Settlor, the taxability of gifts when similar control was reserved, and similar questions. Petitioner's counsel apparently consider that there is no substantial difference between the two questions of what Congress and the States may constitutionally tax and what the Revenue Act in question does undertake to tax; or the arguments and considerations which are appropriate in considering these two very different questions.

That "shift of economic benefits" may be a good test in passing upon the constitutionality of an attempted tax, does not lead to the converse principle that Congress has undertaken to tax all shifts of economic benefits; and as pointed out by Judge Parker (R. p. 50-51) any such contention leads to the impossible result that

property held upon a life estate with remainder over is subject to tax under the present law when the life tenant dies. In fact it is difficult to see why much of the argument in Petitioner's brief is not applicable to the simple case of a life interest with remainder over—it would certainly include the common case of a life interest plus a power of testamentary disposition by the life beneficiary, even if it does not include all cases where the decedent had a general power of appointment by will.

This Court has frequently condemned the attempt to apply general expressions used in opinions apart from the connection in which they were used. A number of such cases will be found in *4 Sup. Ct. Digest* (1928), "Courts", Sect. 767. Or to quote from a more recent case:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" (quoting from the opinion by Chief Justice Marshall in the Marbury case).

Humphrey's Executor vs. U. S., 295 U. S. 602, 627.

And again, in a recent case the opinion refers in this connection to "the oft-repeated admonition of Chief Justice Marshall, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."

Wright vs. U. S., 302 U. S. 583, 593.

In so practical a matter as that of the Revenue Laws, an attempt to build up a system of taxation from general expressions in opinions of this Court, dealing with more or less unrelated matters, might well be

called a highly idealistic method, rather than a realistic one.

The statement that for purposes of taxation a general power of appointment has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power or that the power of disposition is the equivalent of ownership, was made in cases in which the Court was dealing with the question of the constitutional right of States to tax, under statutes expressly so providing, the transfer by death of property ~~settled in~~ trust by the decedent; in the first case, with powers of control over the Trustee and an exercised power of testamentary disposition, and in the second case with full power of revocation, &c. Such general statements it is submitted do not apply and could never have been intended to apply to the question whether the present Revenue Law does tax property passing in default of the exercise of a general testamentary power.

> *Curry vs. McCanless*, 307 U. S. 357, 371;
> *Graves vs. Elliott*, 307 U. S. 383, 386.

And the similar general statement in the Chase National Bank and Bullen cases that "to make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes" and that "the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death", are similarly taken from cases in which the constitutional question of the right to tax was the question involved and decided. In the Chase National Bank case such question was the constitutional one whether Section 401 of the Act of 1921 could validly tax, as it expressly undertook

to do, insurance in excess of $40,000 taken out and carried by the decedent with the power reserved and exercisable up to his death to change the beneficiary; while in the Bullen case the question was whether the State of Wisconsin could constitutionally tax as part of a decedent's estate property which he had settled in trust reserving complete control and power of disposition in his lifetime.

> *Chase National Bank vs. U. S.*, 278 U. S. 327, 338;
> *Bullen vs. Wisconsin*, 240 U. S. 625, 630.

We will here relegate to a footnote[1] a brief statement of the nature of the other cases cited by Petitioner

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[1] We are taking these cases up in the order in which they are cited on pages 21-22 and 31-33 of Petitioner's brief; but only some of them contain general statements of the character relied upon by Petitioner and the relevancy of most of them, especially those cited with a "See also", is not apparent.

Helvering vs. Horst, 311 U. S. 112, was an income tax case under Section 22. The owner of bonds had detached from the bonds the coupons which would shortly mature and gave them to his son who collected them. It was held that this amounted to a realization of income by the owner of the bonds and that the dominant purpose of the income tax laws is the taxation of income to those who earn or otherwise created it and who enjoy the benefit of it when paid.

Harrison vs. Schaffner, 312 U. S. 579, was a similar case in which the life beneficiary of a trust had assigned to her children certain specified amounts in dollars to be paid out of the income of the trust for the year following the assignment.

Sanford Estate vs. Comm'r., 308 U. S. 39, was a gift tax case in which the principle was applied that a revocable gift only became final when the power of revocation was surrendered.

Burnet vs. Guggenheim, 288 U. S. 280, was also a gift tax case in which the same principle was applied.

in support of his general propositions, as we wish to give special attention to the *Clifford* case, on which Petitioner principally relies. It involved the scope of Section 22(a) in the income tax law, which is very different in its terms and provisions from the subsection in the estate tax law now under consideration.

Helvering vs. Hallock, 309 U. S. 106, involved the construction and application of sub-section (c) of the Estate Tax Law, providing for the taxation of transfers made by the decedent in his lifetime and intended to take effect in possession and enjoyment at or after his death.

Chase Nat'l Bank vs. U. S., 278 U. S. 327, involved the constitutional question whether Section 401 of the Act of 1921 could validly tax (as it expressly provided) insurance in excess of $40,000 taken out and carried by decedent with the power reserved and exercisable up to his death to change the beneficiaries.

Reinecke vs. Northern Trust Co., 278 U. S. 339, involved the constitutionality and construction of sub-section (c) of the Estate Tax Law, and held that trusts which the decedent had created with full power of revocation reserved during his lifetime, were intended to take effect in possession or enjoyment at or after his death.

Tyler vs. U. S., 281 U. S. 497, held that Congress could tax (as it had expressly done) the passage of the interest of one spouse in property held in entireties, on death to the survivor; and *U. S. vs. Jacobs,* 306 U. S. 363, similarly sustained the constitutionality of the similar provision as to property held in joint tenancy.

Klein vs. U. S., 283 U. S. 231, held that the Estate Tax Law was constitutionally applicable to a contingent remainder which had become a vested remainder by the death of the grantor.

Phillips vs. Dime Trust Co., 284 U. S. 160, upheld the constitutionality of the Section specially including as a subject of estate tax property held by entireties.

Gwinn vs. Comm'r., 287 U. S. 224, involved the similar question of the constitutionality of taxing interests in joint tenancy, as the statute expressly provided.

Porter vs. Comm'r., 288 U. S. 436, is the case which we have discussed under Point 3 of this brief.

In that case a husband had executed a declaration of trust with respect to certain securities owned by him, creating a trust to continue for the term of five years, during which he was to pay to his wife the income as it accrued; but he retained in himself the right to accumulate income (which would revert to him

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Third Nat. Bank vs. White, 287 U. S. 577, is a *per curiam* decision sustaining the taxability of property held in entireties.

Helvering vs. Bowers, 303 U. S. 618, and *Foster vs. Comm'r.*, 303 U. S. 618, are similar *per curiam* decisions following the Tyler case (*supra*) as to property held in entireties.

U. S. vs. Jacobs, 306 U. S. 363, upheld the constitutionality of the statute expressly taxing interests held in joint tenancy.

Saltonstall vs. Saltonstall, 276 U. S. 260, was whether the State of Massachusetts could constitutionally tax (by express provision) property passing under a trust settlement made by decedent with full power to revoke or alter, with the consent of one trustee, during his lifetime.

Graves vs. Elliott, 307 U. S. 383, involved the constitutional question whether the State of New York could (as it expressly did) impose transfer tax upon the relinquishment of a power of revocation.

Helvering vs. Hutchins, 312 U. S. 393, was a gift tax case involving the amount of exemption to which the donor was entitled when he had made a deed of trust for the benefit of numerous beneficiaries.

Corliss vs. Bowers, 281 U. S. 376, held that under the express provisions of the Revenue Act of 1924 income from a revocable trust was taxable to the donor.

Curry vs. McCanless, 307 U. S. 357, (like the companion case of *Graves vs. Elliott* above cited) dealt with the question of the constitutional right of a State to tax, under a statute expressly so providing, the transfer at death of property settled in trust by the decedent with full powers of control.

Bullen vs. Wisconsin, 240 U. S. 625, involved the question whether the State of Wisconsin could constitutionally tax

at the end of the five-year period) and with insignificant exceptions the complete control over the principal as to conversion, investment, reinvestment, etc. It was held that such retained rights in the property might properly be found by the taxing authorites to make him the owner of the fund, within the intent of Section 22(a), so that the income so paid to his wife was taxable to him as part of his own income.

(as the statute expressly did) the succession to property which the decedent had settled in trust reserving complete control and power of disposition in his lifetime.

Chanler vs. Kelsey, 205 U. S. 466, held that a New York statute taxing property passing by the exercise of a power of appointment was constitutional.

Comm'r. vs. Prouty, 115 F. 2d 331 (1st Circ.), involved the question of what was a "substantial adverse interest" under the express provisions in the income tax law as to reservations of powers to revoke and amend.

Richardson vs. Comm'r., 121 F. 2d 1 (2d Circ.), is cited in our text.

Brown vs. Comm'r., 119 F. 2d 983 (7th Circ.), involved the construction of sub-section (d) of the Estate Tax Law, making taxable property which the decedent had transferred in trust, etc., with a reserved power of change or revocation.

Comm'r. vs. Solomon, 124 F. 2d 86 (3rd Circ.), was a gift tax case holding that a revocable gift only becomes complete when power of revocation is surrendered.

U. S. vs. Robins, 269 U. S. 315, held that under the law of community property as recognized in California the income from such property is taxable to the husband and not to the wife.

Cohen vs. Samuels, 245 U. S. 50, held that a policy of insurance which had a cash surrender value passed to the trustee in bankruptcy under the provision in the bankruptcy law clothing the Trustee with all powers which the bankrupt might have exercised for his own benefit. (Manifestly a testamentary power could not so pass or be exercised by a Trustee.)

Whether this decision would apply to and include a similar trust, created by a third party, for the benefit of the husband and his wife, is a question which has not been passed upon by this Court. The fact that he was himself the creator of the trust is stressed in the opinion; and the *Richardson* case (*Richardson vs. Comm'r*, 121 F. 2d 1, decided by the Circuit Court of Appeals of the First Circuit and in which certiorari was denied by this Court), which is relied upon as showing that it is immaterial, was a case in which the property in question had been assigned by the husband to his wife one year before they joined in creating the trusts, under which it was held that the income from the trusts was substantially the income of the husband.

However that a question the decision of which is not necessary in the present case, and which we may well concede for the sake of argument, since the language of Section 22(a) of the income tax law and that of Section 302(a) of the estate tax law (involved in this case) are so different and the history and background of the two provisions are so unlike, that the argument and principles relied upon in the *Clifford* case, are inapplicable to the interpretation of "interest" in Section 302(a).

The broad language of Section 22(a) included among "gross income" all "gains, profits and income derived from professions, vocations, trades, businesses, commerce, or sales, or dealings in property * * * growing out of the ownership, or use of, or interest in, such property; also from interest, rents, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." (It is to be noted that

the concluding clause had what is sometimes called the vice of including the term to be defined in the definition; and included generally whatever might be called income.) It was in reference to these all-inclusive words that the Court said "that the broad sweep of the language indicated the purpose of Congress to use the full measure of its taxing power within the definable categories" (p. 334); and that "technical considerations and niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes, should not obscure the basic issue." In the present case the question is whether powers of appointment come within the category of "interests" at all; and it cannot be said that the reference to "niceties of the law of trusts", etc., carries with it the implication that the distinction between interests and powers is an outworn legalistic conception, even in tax cases. It was not so considered in the *Field* case and other cases which we have cited under Point 3, *ante;* nor can Congress have had any such result in view, since throughout the history of the estate tax law it has consistently observed such a distinction by providing specially (as in Subsection f) for powers of appointment, and for other cases, which certainly indicates no disregard of such legal distinctions.

Helvering vs. Clifford, 309 U. S. 331.

It is worth noting in this connection that in the companion case of *Helvering vs. Wood*, similar in its facts to the *Clifford* case, but in which the Government did not invoke the provisions of Section 22(a) but had expressly waived reliance on any other section than the narrow provisions of Section 166 (which it was held

were not applicable), and in which it was argued that "in economic fact" the power to revoke is the equivalent of a reversion, this argument was answered in the opinion (which was delivered by the same Justice as in the *Clifford* case) by saying that "at least in the law of estates they are by no means synonymous"; and that whether as a matter of policy such distinctions should be perpetuated in the tax law by selecting one type of trust but not the other for special treatment, "is not for us."

Helvering vs. Wood, 309 U. S. 344, 347.

As we have said the question with respect to Section 302(a) is whether powers of appointment are included in the general category at all, and while the broad language as well as the numerous enumerations of Section 22(a) may have indicated the purpose of Congress to use the full measure of its taxing power, within the categories mentioned (which included, as we have seen, "all income derived from any source whatever"), to hold that the word "interest" is a category of equal breadth and scope would involve the supposition that tax laws are to be construed on the theory that all possible taxes which might constitutionally be levied, are to be considered as having been imposed; which is of course contrary to the well settled principle that the provisions of taxing statutes are not to be extended by implication and that doubts must be resolved in favor of the taxpayer.

United States vs. Field, 255 U. S. 257, 262;
Reinecke vs. Northern Trust Co., 278 U. S. 339, 348-9.

It is not necessary to cite the numerous other decisions of this Court enunciating and applying this well known rule.

The general authorities cited in Petitioner's brief (p. 32, &c.) as supporting his claim of substantial equivalence of powers of appointment and ownership, do not give any support to such a contention. The statement that "even at common law a life estate plus a general testamentary power was considered almost the equivalent of fee ownership" which is supported by a reference to *Sugden on Powers*, is entirely unsupported by the reference. The discussion in Sugden's work referred to begins with the following statement by the author (see p. 177 in the edition referred to):

> "It will here be proper to consider what is a *power*, and not an *interest*"

and is followed by the statement (p. 178):

> "A devise to A for life, expressly, with remainder to such persons as he shall by deed or will, or otherwise, appoint, will of course not give him the absolute interest, although he may acquire it by the exercise of his power, and the rule applies to personal estate as well as real estate."

This is followed by a discussion of cases where the devise was not expressly for life but indefinitely, followed by language which might be taken as either describing the devisee's interest or as possibly creating a power. (It should be remembered in this connection that in Sugden's time words of perpetuity were required to give more than a life estate.)

The author concludes the discussion (p. 183) by saying, however, that "wherever a power is clearly intended to be given, the devisee cannot be holden to take a fee."

Sugden on Powers, 1856 Am. Edit., Vol. 1, pages above noted.

The citation from Mr. Glenn's work on fraudulent conveyances merely shows that Mr. Glenn strongly approves of the statutes which have been adopted in some States subjecting to liability for debts of a decedent property covered by a general power of appointment though not exercised (*Glenn on Fraudulent Conveyances*, Section 159-160); and the New York statute referred to by Petitioner is a statute of this character which, however, saves all future estates limited in case the power of absolute disposition is not exercised, and the property is not sold for the satisfaction of the decedent's debts (*New York Real Property Law*, Section 149).

But what application have these citations to the present question, especially as this Court found in *United States vs. Field, supra*, that the existing common law was not such.

North Carolina has no such statute, and it was long ago decided, in that State, that the rule as to the liability of property subject to power of appointment for the donee's debts, was the same as that assumed in the *Field* case, viz, that if the power were exercised, the property could be subjected in equity to the payment of the donee's debts; but if not exercised, it could not be reached by creditors.

> *Harrison vs. Battle* (1835), 21 N. C. (1 Dev. & B. Eq.) 213;
>
> *Rogers vs. Hinton* (1867), 62 N. C. (Phillips Eq.) 101; S. C. 63 N. C. 78.

That the distinction between property and powers of appointment is fully recognized in the North Carolina law is clearly shown by the following quotations from the *Battle* case just cited and a later case, in both

of which the donee had a life estate with general power of appointment.

> "There is a marked distinction between property and power. The estate devised to Mrs. Chewning is property, the power of disposal a mere authority which she could exercise or not at her discretion."
>
> *Chewning vs. Mason,* 158 N. C. 578.

> "The simple power which Frances Cooper had was no estate in the trust."
>
> *Harrison vs. Battle,* 21 N. C. 214.

The argument that a donee of a general testamentary power has an "interest" because he may be held liable in damages for breach of a contract to execute such a power in a certain way, although admittedly such contracts cannot be specifically enforced (p. 30), proves nothing. A man may obligate himself so as to be liable in damages, to do anything, unless the contract is for some reason illegal or contrary to public policy. Thus he may be held liable under a general warranty of title, though, and for the reason that, he had no title to the property as to which such warranty was made. This does not amount to his having any rights or interest in the property warranted. An insurance company may insure a vessel already lost at sea, if the contract so provides.

Incidentally, the Harvard Law Review note (*51 Harv. L. Rev.* 1451) referred to is a note appended to an Illinois case holding that damages could *not* be recovered for the breach of a contract to appoint under a general testamentary power, and says that the case is the only decision on this point found in the

United States. But whether or not the breach of such a contract justifies a suit against the contractor (who may be insolvent) or a claim against his estate, it is perfectly clear that it gives no rights against the property itself, or against whoever may take it as the result of non-exercise of the power (except under a statute like the New York one referred to).

And if it be true that a general testamentary power may be released by the donee for a consideration (a question on which there has been considerable conflict of authority), such release may be made only to the parties taking in default of exercise of the power, and does not give the donee of the power any rights equivalent to those of an owner, to dispose of the property during his lifetime.

6. That the fact that Congress by the Revenue Act of 1926, in making the change in the wording of Section 302(a) which is relied on as having effected the hitherto unsuspected result now contended for, reenacted unchanged and without explanation the provisions of Section 302(f), taxing the exercise of a power of testamentary appointment, does indicate clearly that no such result as is now contended for was intended or contemplated.

We do not contend that there is any arbitrary rule that the provisions of successive sections in statutes must not overlap, or that it is not infrequently the case that different provisions do to a greater or less extent overlap, so that a particular state of facts may bring a case within more than one section or provision of a statute.

The question is after all one of legislative intent, and goes only to what light is thrown on the legislative intent by such double provisions. If the intent of one

section be entirely clear, and free from any ambiguity (as we submit is the case with reference to Section 302a) then of course there is no occasion for resorting to such considerations. But if a real question exists as to the scope of one section (and counsel for Petitioner will hardly have the assurance to contend that the meaning sought to be attributed to it after fifteen years of universal belief to the contrary is so clear as to be subject to no doubt), then the fact that Congress reenacted in the Act of 1926 (and subsequently again reenacted) a section made not only unnecessary but positively misleading (so misleading that it has misled everybody for fifteen years) by the broader scope which it is now claimed was given to Section 302(a), is certainly of great importance in determining whether Congress intended the result now claimed. As said in *U. S. vs. Field*, 255 U. S. 257, 264-5, "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed." And the insertion of the clause expressly taxing such property "indicates that Congress at least was doubtful whether the previous Act included property passing by appointment." Or as said by Judge Parker in the opinion of the C. C. A. in the present case (R. p. 49):

> "We recognize of course that the specific provisions following Subsection (a) are not necessarily inconsistent with an intention to give to that subsection a scope broad enough to cover the matters covered by these specific provisions" (citing the *Clifford* case), "but it is hardly thinkable that Congress would have passed Subsection (f) to cover property passing under the exercise of a general power of appointment if property subject

to such power, whether exercised or not, was already embraced by Subsection (a)."

The cases summarized in Petitioner's brief on pages 40-41 are not for the most part appropriate as establishing the proposition that there is no arbitrary rule that different provisions in the statute must not, or should not, overlap; a proposition which we have not disputed. We are stating the substance of these cases in a footnote.[2]

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[2] In *Reinecke vs. Northern Trust Co.*, 278 U. S. 339 (1929) the settlor died in 1922 and the Revenue Act of 1921 was the statute involved. There is no mention of Section 302(d) of the subsequent Act of 1924 (which Petitioner says specifically covered the particular case presented), anywhere in the report of the case nor was the Court's attention in any way directed to it as having any bearing or application. Being an Act passed subsequent to the date as of which tax liability accrued, it could hardly have had much effect on the decision if it had been brought to the attention of the Court.

Burnet vs. Guggenheim, 288 U. S. 280 (1933), was a gift tax case, and the law applicable Sections 319 and 320 of the gift tax law of 1924. The gift in question had become final by surrender in 1925 of the power of revocation originally reserved, for which year gift tax was accordingly claimed. The Act of 1932 which Petitioner says contained a provision which the decision rendered superfluous, was passed seven years after the basic date, and after the decision of this case by the C. C. A., and the only reference to it in the Court's opinion is on p. 283, where the opinion says that it "will give the rule for later transfers."

Sanford Est. vs. Comm'r., 308 U. S. 39 (1939) was also a gift tax case. The date of incidence of gift tax, it was decided, was 1924, when power of revocation was finally surrendered, and the law applicable was the Act of 1924. The opinion merely refers to the Act of 1932 (passed eight years after the basic date) as having made the donee also liable for gift tax, from which it argues (as showing that gift tax does not accrue when a revocable gift is made) that

All that was said on the purpose or scope of the proposed change in the report of the Committee on Ways

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Congress cannot be supposed to have intended to impose such liability on a donee of so incomplete a gift that it might be taken from him by revocation on the next day. And on p. 45 in a footnote the Act of 1932 is merely referred to as having added a new provision to the gift tax law, which was repealed in 1934 because the decision in *Burnet vs. Guggenheim* made it unnecessary.

Higgins vs. Smith, 308 U. S. 473, merely held that the provision in the Revenue Act of 1934 providing that losses on sales to corporations controlled by the taxpayer are not deductible, did not necessarily show that the preexisting law (under which the case arose) was otherwise.

Douglas vs. Willcuts, 296 U. S. 1, 10, says that the particular provisions in the statutes defining instances in which the grantor remains taxable, as in case of certain reservations for his benefit, etc., are not to be regarded as excluding instances not specified where in contemplation of law the income remains in substance that of the grantor.

Helvering vs. Minnesota Tea Co., 296 U. S. 378, 384, held that if one of two clauses did "somewhat overlap the other" (referring to the provisions relating to reorganizations under the income tax law) "the taxpayer should not be denied for that reason what one paragraph clearly granted him."

McCauley vs. Comm'r., 44 F. 2d 919, was a case arising under the Revenue Law of 1921. The specific provision referred to was enacted in the law of 1924 (subsequent to the basic date), which the Court thought from its history was merely declaratory of the preexisting law.

O'Donnell vs. Comm'r., 64 F. 2d 634, was similar to the case last cited, in that it held that while a section in a later act was not expressly made retroactive, it was generally considered to be a declaration and clarification of existing law, and not a change of legislative intent.

Helvering vs. Clifford, 309 U. S. 331, does support the general proposition (which as above said we have not disputed) that a special provision for one particular class of cases does not necessarily exclude such cases from the purview of a broader section. We have discussed this case more particularly in its bearing on the questions involved in this case, under the previous heading of this brief.

and Means while the Act of 1926 was pending in Congress, is as follows (R. p. 45):

> "Under existing law the gross estate is determined by including the interest of the decedent at the time of his death in all classes of property which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. In the interest of certainty it is recommended that the limiting language above referred to shall be eliminated in the proposed bill, so that the gross estate shall include the entire interest of the decedent at the time of his death in all the property."
>
> House Reports, Vol. 1, 69th Congress, 1st Sess. 1925-6, at p. 15;
> Cf. Senate Reports, do, at p. 7, etc.

This also would seem to negative any intent to introduce so radical a change in the statute, as it is now contended was meant. If the amendment in Section 302(a) made by the proposed statute (Act of 1926) was intended to have the effect now claimed, it might have been better said that the change was proposed "in the interest of uncertainty" (Point 8, *post*).

7. That the decedent (Zachary Smith Reynolds) did not have rights under any of the three trusts involved which can be said to be substantially equivalent to ownership.

In Petitioner's brief (p. 26, etc.) these rights are classified as being (A) lifetime enjoyment of the property to the exclusion of all others; (B) an unlimited power to dispose of the property by will to whomsoever he chooses; and (C) the assurance that if he fails

to dispose of the property by will it will pass to members of his immediate family. We shall therefore discuss the nature of the rights which he had at the time of his death under four headings; viz, his rights in the income, his rights in the corpus (other than his power of testamentary disposition), his power of testamentary disposition, and, lastly what Petitioner calls the assurance that the property would pass in the absence of appointment to the members of his immediate family.

His rights with respect to the income of the trusts.

These rights were extremely limited, and at the time of his death were not even equivalent to an equitable life interest in the income from the three trusts.

An equitable life estate implies at least the right to receive the income from the trust or have it applied to one's use and benefit.

Under the will of his father (R. p. 59) it was left to the discretion of his mother, during his minority, how much of the income, if any, should be paid to *her* for his support, maintenance and education; and after attaining the age of twenty-one and until twenty-eight the Trustee was directed to pay him only five thousand dollars a year, unless in the opinion of his mother, if she were living, that amount should be inadequate; but in no event was such total annual allowance to exceed fifty thousand dollars (a small fraction of the total income from the property in question). Any surplus income was directed to be accumulated until he should attain twenty-eight and such accumulations were to become an addition to corpus, which he would receive only in the event that he survived until he was twenty-eight. He was not therefore the only person

interested in the income; but those who would take under the will in the event of non-exercise of his power of testamentary appointment; viz, his issue, his brother and sisters, under the limitation over in trust for them, etc., had distinct rights in the greater part of the income which was necessarily accumulated.

Under the will of his mother (R. p. 69), until he attained twenty-one the amount to be applied for his support and education was similarly restricted, and after attaining twenty-one and until twenty-eight the entire income was to be accumulated and added to corpus, subject only to a discretion given the Trustee to apply part of it for his benefit if deemed necessary. Not until after he attained twenty-eight was he to receive the entire net income from the accumulated assets of the trust.

Under Mrs. Johnston's deed of trust (R. p. 74) until he should attain twenty-eight the entire income was to be accumulated and added to corpus.

In all three cases therefore his rights in the income (except for a relatively small allowance in the first two cases and none in the third) were future and contingent.

His Rights with Respect to the Corpus (other than His Testamentary Power).

Under his father's will, if he survived to attain the age of twenty-eight, he would have then become entitled to receive the corpus and accumulated income of the trust. Under the will and deed of trust of his mother he would never have succeeded to more than an equitable life estate in the income from the accumulated trusts, even after he attained the age of twenty-eight.

The nature of this future interest (right to receive the property at the age of twenty-eight) under the R. J. Reynolds' will was the subject of elaborate consideration in a recent case, in which, after Richard J. Reynolds, the eldest of the four children of R. J. Reynolds, had attained the age of twenty-eight and received his share, the question arose as to the proper basic date for determining the cost or value of the assets so received, when he subsequently disposed of them. On one side it was claimed that the basic date for this purpose was when he attained twenty-eight. It was contended by the Commissioner (which contention was supported by the Regulations) that the death of his father was such basic date, whether the will conferred a vested estate or a purely contingent one upon him, prior to attaining twenty-eight.

The Circuit Court of Appeals for the Fourth Circuit considered fully in this case the question whether the will conferred a vested estate or a purely contingent estate (prior to attaining twenty-eight) in the corpus, and decided that the limitation to him on attaining twenty-eight was a contingent remainder.

Reynolds vs. Comm'r, 114 F. 2d 804 (Oct. 1940).

While the decision in this case was reversed on certiorari, yet the scope of review was expressly confined to the Federal question involved, excluding any review of the question whether the taxpayer took a vested estate under his father's will before attaining twenty-eight.

Helvering vs. Reynolds (grant of certiorari), 312 U. S. 672; (final opinion) 313 U. S. 428, 430.

The Superior Court for Forsyth County, North Carolina, in its judgment, affirmed by the North Carolina Supreme Court, made certain findings as to the nature of Zachary Smith Reynolds' interests in these trusts. Such findings were not dictum, but were relevant in connection with the determination of the question whether there was any basis for the claim of the State of North Carolina to inheritance tax; such claim being contested by the Trustee.[3] These findings will be found on p. 94 of the present Record and conclude with respect to the trust under his father's will that until he arrived at the age of twenty-eight years the only interest which he had in the trust estate established by said will, or any part thereof, was to receive such payments from the income thereof as might become payable to him under the terms of the will, and that consequently upon his death under twenty-one no part of said trust estate (either corpus or income) was transferred from him to anyone.

Under the will and under the deed of trust of his mother, Mrs. Johnston, there was no similar provision for paying over to him corpus at twenty-eight, or any other age. Under these two trusts, upon attaining twenty-eight he would have become entitled to receive the net income from the accumulated trust, for the rest of his life, and would never have succeeded to any other right under these two trusts than such rights in the income and his power of testamentary appointment.

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[3] As some comment has been made in the course of this case upon the fact that the State of North Carolina was allowed a large amount in compromise of its claim, we wish to call attention to the fact that the North Carolina inheritance tax law expressly includes unexercised powers of appointment. Ann. Code North Carolina, Section 7880(I) Fifth.

His Power of Testamentary Appointment.

It has not been denied that his testamentary power, in all three of the trusts, was a general power in the sense that it was not limited to be exercised only for limited purposes and for a limited class of beneficiaries. Such general powers of appointment are common, as stated by Petitioner, in innumerable other trusts covering property of incalculable value (*ante*, p. 12). That they do not constitute an interest in the property subject to such power is as we have shown clearly established.

But it is not even true, in the present case, that Zachary Smith Reynolds had at the time of his death a present power of testamentary appointment.

Petitioner argues in his brief (p. 34, Note 17) that his disability from exercising his testamentary powers "did not inhere in the powers" and was in no way different from the disability which he would have been under had he held legal title to the property held in the trust, at the time of his death; and that a change of domicile might have enabled him to exercise his power though still under twenty-one. The contrary however was found or decided by the North Carolina Courts in reference to these powers.

In the opinion of Judge Clarkson in the Cabarrus County case (as quoted in the opinion of the Board R. p. 18; *Reynolds Guardianship*, 206 N. C. 276 at p. 290), it was said that it was to be inferred that R. J. Reynolds made his will with the North Carolina law in view and that "no language gives the right of appointment under twenty-one years of age," and further that "the wills of R. J. Reynolds and Katharine S. Johnston appear to indicate an intention that Zachary Smith Reynolds could only exercise the power of ap-

pointment after he became twenty-one years of age," (evidently referring to the elaborate provisions for guardianship till then); and accordingly in the judgment in the Forsyth County case it was found that "even if Zachary Smith Reynolds had the power to adopt a domicile of choice and execute a will in the State of New York which would affect his present estate absolutely owned, such a will could not exercise the powers of appointment under the will of his father R. J. Reynolds and the will and deed of his mother Katharine S. Johnston" (R. p. 730; *Reynolds vs. Reynolds*, 208 N. C. 578 at p. 592). It was also found by the Maryland Court (R. p. 35; as quoted in Judge Parker's opinion, R. p. 51) that the attempted will "was altogether void and without effect as an exercise of any power of appointment or disposition which Zachary Smith Reynolds would have possessed or had, if he had attained lawful age at the time of his death." If therefore under North Carolina law he did not have such a power before attaining twenty-one, it would seem clear that at the time of his death he did not have a present power of testamentary appointment.

It is objected that neither in the North Carolina case nor in the Maryland case did the Judge who entered the judgment or decree file an opinion. The recitals and findings in the North Carolina case however were as full as any opinion, in determining the North Carolina law as applicable to the case before it; and both judgments or decrees were entered after full argument and in cases in which every possible person in interest had been made parties, including legatees under the attempted New York ~~law~~. will

Recent decisions of this Court tend to support rather than to impair the conclusiveness of determinations of

the law by State tribunals. No new principle as to the scope of Federal law and State law was introduced by the decision in the *Morgan* case (*Morgan vs. Comm'r*, 309 U. S. 78). In that case the State of Wisconsin had undertaken to define "general powers" as including only powers exercisable either by deed or by will; defining all other powers as special. It was held that while the nature of the power conferred was to be determined according to Wisconsin law, that this did not mean that the Federal Courts were bound by such a definition; but that the nature of the power in its essential attributes should be determined according to State law, and that then the question of whether it was a "general power" within the terms of the Act of Congress, was a Federal question.

In three cases decided by the Supreme Court on December 9th, 1940, it was held that the Federal Courts should follow the decisions of intermediate state appellate courts and even courts of first instance, in the absence of any final decision of the highest court of the State.

> *West v. Am. Teleph. Co.*, 311 U. S. 223;
> *Six Companies v. Joint Highway Dist.*, 311 U. S. 180;
> *Fidelity Union Trust Co. v. Field*, 311 U. S. 169.

See especially the opinion in the *Blair* case and its discussion of the applicability and the effect to be given to a decision of the State Court (obtained after a contrary decision of the Federal Court in a case involving the taxpayer's income for the preceding year) construing the provisions of the trust involved in that case; especially in connection with the discussion in the

case in the C. C. A. below beginning with the words "We would be better satisfied if the suit in the State court had been more adversary in its nature," concluding that the case was not unlike a consent decree, yet consent decrees are binding if entered by a court of competent jurisdiction with the parties properly before it in the absence of a showing of collusion or fraud upon the Court.

> *Blair vs. Comm'r*, 300 U. S. 5;
> *Comm'r vs. Blair*, 83 F. 2d 655, 657;
> Cf. *Sharp vs. Comm'r*, 303 U. S. 624 (*per curiam* opinion reversing *Sharp vs. Commissioner*, 91 F. 2d 802);
> *Freuler vs. Helvering*, 291 U. S. 35.

We submit, therefore, that the findings and decisions of the State courts in the present case establish that the decedent at the time of his death did not yet have present powers of testamentary appointment; not only because of the "accidental" fact of minority, but for reasons inherent in the powers themselves, under the terms of the instruments creating them, and under North Carolina law.

The case presented is not, as Petitioner contends, analogous to that of ownership of property by an infant. In such a case it is true that the infant's incapacity to transfer would not affect the estate tax. In that case, however, the infant has a *present vested right* in the property, *which passes from him* upon his death, by devolution of law. In the present case, by reason of the condition precedent, he did not have the present power of appointment, and, upon his death, the property did not pass from him, by reason of his failure to exercise an existing power of appointment. On the

contrary, the property passed under the testator's will by reason of the fact that the decedent never acquired the power of appointment.

Certainly there is no basis in this case for any contention that the decedent made a deliberate choice not to execute the power and that, by so doing, he really passed the property on to those who took in such event. As a matter of fact, the decedent did attempt to exercise the power. His attempt was void because he had not arrived at the age at which it was intended he should have the power.

Petitioner argues in his brief (p. 34, Note 17) that the decedent's disability to exercise the powers "was no different from the disability under which he would have been had he held formal fee title in the property at the time of his death"; and further argues that it is immaterial whether the decedent had a present power of testamentary disposition or only a power which he could exercise at the time of his death under twenty-one. From the standpoint which we are now discussing this argument would seem to run somewhat like this:

(a) Decedent had a power of appointment.

(b) This power of disposition was equivalent to substantial ownership.

(c) If he had been the absolute owner he could not have disposed of it.

(d) Hence it is immaterial whether he had the power of disposition or not.

This is rather a strange argument in view of Petitioner's constant insistence upon a "practical" and "realistic" treatment of tax questions. If from a practical standpoint, "the power of disposition is the

equivalent of ownership," we submit that the absolute incapacity to exercise a power is the equivalent of no power at all.

His Assurance that the Property Would Pass in the Absence of Appointment to the Members of His Immediate Family.

As well said by Judge Parker in the opinion below (R. p. 44):

> "Nor is anything added by reason of the fact that the persons designated to take in default of appointment were the natural objects of decedent's bounty. They were the natural objects of the bounty of his father and mother also; but the question of importance is that in default of the exercise of the powers of appointment by him, they took not from him or through him, but under the wills of his father and mother and under the deed of his mother."

Nor is it to be assumed that the several classes who were to take under the trusts now in question, upon the non-exercise of the power, were necessarily those to whom the testator would have bequeathed his own outright property. He did not in fact attempt to will the property to his own children.

But we cannot see that such an "assurance" adds anything more to a decedent's rights in property, than his expectation of inheriting from his father or mother, while they were still living, would constitute an "interest" in property owned by them.

Whether therefore his rights be considered separately or collectively (as a "bundle of rights"), they fall far short of anything which by any stretch of the

words can be called substantially equivalent to ownership.[4]

8. That to hold that the scope of Section 302(a) was broadened so as to include all cases in which a court may think that the rights of decedent were substantially as beneficial as outright ownership, would put the determination of such cases in a legal fog; and that if Congress had intended any such sweeping change it would have made some provision for defining or determining what the nature of the interest in property not belonging to the decedent should be to justify its inclusion.

As we have already mentioned (*ante*, p. 40), it was stated in the report of the Committee while the Act of 1926 was pending in Congress, that the change proposed to be made was "in the interest of certainty." If the intent and purpose of the change was in any respect what is now contended for by Petitioner, then it might well be said that so far from introducing greater certainty in the law, it established a wide field of uncertainty, and left it for the courts to decide what cases of "passage of economic benefits," what

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[4] Petitioner's Brief contemptuously calls all of these limitations upon the rights of the decedent, "restraints on alienation" or "spendthrift trust provisions" (pp. 14, 15, 18, 28, 32 and 36). This is a strange abuse of terminology. The will of R. J. Reynolds does contain a "spendthrift trust" provision in conventional form (Item Eighth, R. p. 63), but we have not relied upon that in support of our contentions. The holding of the Circuit Court of Appeals for the Tenth Circuit, in *Landman vs. Comm'r.*, 123 F. 2d 787, that the descent of property owned by a Creek Indian was not exempt from estate tax because of the control exercised by the Government over the property of such indians, is not here in point.

powers of appointment and what rights in property which did not constitute either ownership or an estate or interest, were to be considered as bringing cases within the scope of the section as so amended.

That Congress has never heretofore intentionally undertaken to tax the non-exercise of powers of testamentary appointment is of course well known. If it had undertaken to impose an excise tax upon such passages of title, contrary to its preexisting policy, it is inconceivable that Congress would not have included in the statute some indication or guide as to the character of rights which were to be considered as included within the section as amended; and would have thrown upon the courts the entire burden of deciding these questions. It is of course conceded that prior to the Act of 1926 Subsection (a) was strictly an estate tax provision, in that it was confined to property owned by the decedent and which normally would constitute part of his "estate" on death. If the argument of Petitioner's counsel that the leaving out of the words omitted in the reenactment of Section 302(a) by the Act of 1926 had any of the results now contended for, then Congress would have been putting upon the courts the burden of working out the principles which should apply in the ascertainment of the new field so opened for taxation, which would be a task of far greater difficulty than any resulting from the decision in the *Clifford* case with respect to the scope of Section 22(a) in the Income Tax Law.

In view of the history of Federal estate taxes, and the failure of Congress at any time to suggest the inclusion of unexercised powers of testamentary appointment as the subject of an excise tax, it is inconceivable that Congress intended to introduce so ex-

tensive and novel a field, and that if Congress had so intended, it would not have been more specific as to the boundaries of the field so added to the transfers intended to be taxable under the Act.[5]

[5] Petitioner says (p. 24) that the construction of the statute adopted by the Court below, leaves unanswered the "critical question", of why Congress would have wanted to draw such a distinction (between powers and ownership).

We abstain from any discussion of the question whether the non-exercise of a power of appointment should be made the subject of an estate or inheritance tax, and whether it would be desirable to include as the subject of such taxation "economic shifts" due to the death of life tenants, etc.; and whether as sometimes suggested estate and succession taxes should be so framed that all estates and trusts (especially all large fortunes) would be subjected to such taxation at least once in every generation. These are, of course, questions for Congress to decide, and not for this Court; and in this connection we desire to quote the words of a very recent decision in the case of a contract between a shipbuilding company and the Government, in which apparently considerations of this character had been urged.

In the principal opinion delivered by Mr. Justice Black it is said that the profits made in the contract before the Court and other contracts entered into under the same system "may justly arouse indignation. But indignation based on the notions of morality of this or any other Court cannot be judicially transmuted into a principle of law of greater force than the expresed will of Congress". (Citing a similar statement in Justice Miller in *Smoot's case*, 15 Wall. 36, 45-46). In his concurring opinion Mr. Justice Murphy says that "the question before the Court for decision, however, is not whether an arraignement like the one presented for review accords with our conception of business morality or with correct administration of the public business. * * * It is the duty and responsibility of the Courts, not to rewrite contracts according to our own views of what is practical and fair, but to enforce them in accordance with the evidence and recognized principles of law." Mr. Justice Douglas in his dissenting opinion said that on the point of duress and coercion he thoroughly agreed with the views expressed by

9. That the attempt to tax as part of a decedent's estate, the passage of title due to his death under limitations in trust settlements made before any law attempting to tax such devolutions was passed, would involve serious constitutional questions as to the validity of such an attempt, and that the existence of such questions is a sufficient reason for not assuming that any such result was intended by Congress, by the amendment of the law now invoked.

It has been repeatedly held that the existence of serious constitutional questions is a sufficient reason for construing statutes in such a manner as to avoid such doubts. Many older cases on this are collected in *1 Honnold, Supreme Court Law*, Construction of·

Mr. Justice Black and joined in the opinion of the Court; and Mr. Justice Frankfurter in his dissenting opinion said:

> "What powers the Congress should give the President in order to obtain the most effective production of war supplies, how the President should exercise those powers, whether a system of private contracts for war materials is conducive to unjustifiable waste and profiteering, or whether government production of necessary war supplies is a wiser course,—these and other like matters are not our business and upon them we should neither express nor intimate views. However circumscribed the judicial area may be we had best remain within it."
>
> *U. S. vs. Bethlehem Steel Corporation*, decided Feb. 16, 1942; U. S. Law Week, Vol. 10, Sect. 4, pp. 4200, &c.

It is not conceivable that the question whether the non-exercise of power of appointment should be subjected to Federal tax, is a question that would arouse "moral indignation". But if any of the Justices of this Court should have strong views upon that question, we respectfully submit that such questions are for the determination of Congress, and not of this Court.

Statutes, Section 22, p. 584. Leading recent cases applying this principle to the construction of the revenue laws include the following:

> "We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick * * *. Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind."

> *Lewellyn vs. Frick*, 268 U. S. 238, 251;
> *Reinecke vs. Trust Co.*, 278 U. S. 327, 348;
> *Bingham vs. United States*, 296 U. S. 211, 218;
> *Industrial Trust Co. vs. U. S.*, 296 U. S. 220.

(It should be noted that in the third case above cited the Justices who did not concur in some of the conclusions stated in the majority opinion but concurred in the result, based their concurrence upon this ground).

That such serious doubts do exist in the present case is apparent from the following decisions of this Court.

In *Nichols vs. Coolidge* it was held that Section 402(c) of the Revenue Act of 1919 (sometimes called the Act of 1918), in so far as it required that there should be included in the gross estate the value of property transferred by a decedent prior to its passage, merely because the conveyance was to take effect in possession or enjoyment at or after his death, violated the Fifth Amendment.

> *Nichols vs. Coolidge*, 274 U. S. 531, 542.

In three cases which were heard and decided at the same time, in 1935, the question was presented whether Section 302(d) of the Revenue Act of 1926 (which provided for the inclusion in gross estate of any interest in property of which the decedent had at any time made a transfer subject at the time of his death to change by him through exercise of a power, etc.), applied to transfers in trust made before its enactment. It was held that while as applied to transfers made in trust after its enactment it was not arbitrary or unreasonable, it would violate the Fifth Amendment if applied to transfers in trust made before its enactment without reservation of a power by the grantor to revoke, alter or amend. This was held, it should be noted, even in cases where the creator of the trust was the decedent.

> *Helvering vs. City Bank*, 296 U. S. 85, 92;
> *Helvering vs. Helmholz*, 296 U. S. 93, 97;
> *White vs. Poor*, 296 U. S. 98, 102.

It should be noted that the Justices who concurred in the result in these cases concurred as to the unconstitutionality of the retroactive clause in the statute.

In the *Saltonstall* case the question was whether the State of Massachusetts could constitutionally subject to inheritance tax (by a statute so providing) property passing under a trust settlement made by a decedent in his lifetime, in which power to revoke or alter during the settlor's life, was reserved (no power of testamentary appointment was involved). It was held that the statute was constitutional as applied to a trust created (by the decedent) prior to its passage, and the case was distinguished from *Nichols vs. Coolidge* upon the ground that the Massachusetts statute in question

imposed a tax upon the takers' privilege of succession; not like the statute involved in *Nichols vs. Coolidge* (Federal Estate Tax), a tax upon the donor or his estate.

Saltonstall vs. Saltonstall, 276 U. S. 260.

These decisions therefore apparently leave the law applicable to the constitutionality of attempts by statute to tax transmissions occurring under trusts created prior to the statute about as follows: If such tax is a tax on the decedent or a tax on the decedent's estate, such as an estate tax is, then it is unconstitutional to include devolutions occurring under trusts created prior to the passage of such law. If on the other hand the tax in question is in the nature of an inheritance tax, upon the beneficiary's succession to the property in question, then the objection of unconstitutionality does not apply. Whether this Court should or would now overrule any of these decisions is a question which we do not think it necessary to argue in this case, which is concerned primarily with the construction of the statute. It is sufficient to show that serious constitutional questions are involved in Petitioner's contention.

In the present case it is clear that the law in question is an estate tax law. The primary liability is on the estate of the donee of the power.

R. J. Reynolds, the creator of the largest trust (according to our calculation over 90% of all of the property involved; for Petitioner's figures which indicate about 85%, see p. 27 of his brief), died in July, 1918, before the Estate Tax Law of 1919 was adopted. And while Mrs. Johnston's two smaller trusts were created after 1919, they were created before the entirely novel

attempt to tax such passages of title which is now attributed to the Act of 1926, was made, if ever made at all. If therefore Petitioner's contention as to the scope and effect of the change in Section 302(a) made in the 1926 law were correct, it would follow that by that Act Congress was attempting to impose an estate tax upon rights passing under trust settlements which were created prior to the enactment of such statute.

It is true that Judge Parker said in his opinion below (R. p. 46) that the question before the Court was not whether Congress had the power to tax, but whether it was intended to exercise that power; and that it might be assumed that Congress had such power. We think that what Judge Parker meant by this was that it might be assumed *argumenti gratia*. But in any case we submit that under the foregoing decisions there is serious doubt whether Congress (or a State) can impose by way of estate tax (as distinguished from an inheritance tax against the beneficiaries), a tax on account of the devolution of title under the terms of a trust created before such an attempt was made, and due to the non-exercise of a power of testamentary appointment by the decedent; especially when he never had the ability to exercise such power.

II.

THAT THE PRINCIPLE OF LYETH VS. HOEY, 305 U. S. 188, DOES NOT REQUIRE THAT ANY PART OF THE PROPERTY HELD IN THESE TRUSTS SHOULD BE INCLUDED IN DETERMINING ESTATE TAX, BECAUSE OF ANY DISPOSITION MADE OF IT IN PURSUANCE OF THE COMPROMISE MADE AND RATIFIED BY THE NORTH CAROLINA AND MARYLAND COURTS.

1. Difference between income tax (accruing on date of receipt) and estate tax (accruing on date of death), in this respect.

Lyeth vs. Hoey, 305 U. S. 188 (Cf. Magruder vs. Segebade, 94 F. (2d) 177), decided that amounts received in compromise of what would not have been taxable income if received, are not themselves taxable income. It is a fair inference from this that conversely amounts received in compromise of what would have been taxable income if received are taxable income. The incidence of tax in such cases is as of the time of receipt and the question in such cases is whether at such time of receipt it had the status of taxable income. "In the ordinary case a taxpayer who acquires the right to receive income is taxed when he receives it, regardless of the time when his right to receive payment accrued."

Helvering vs. Horst, 311 U. S. 112, 115.

No such income tax question arises in the present case, which involves estate tax; nor could it arise because the amounts received in settlement or compromise were received for claims which on no con-

ceivable determination could have constituted income.

But in dealing with Estate Tax there is a quite different situation. Estate Tax liability is determined as of the date of death of the decedent, and subsequent transactions among the parties interested or events do not affect the incidence of the tax, which has to be determined according to the then state of facts. Thus it has been held that the unexpected death of a life beneficiary, shortly after the testator's death and before estate tax return has been made, did not warrant valuing her life interest on the basis of such actual experience, instead of upon her probable life according to the tables at the time when the testator died, because estate tax is imposed upon the basis of the situation then existing, and not as modified by subsequent events.

> "The tax is on the act of the testator, not on the receipt of property by the legatees" (Citations).
>
> *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151.

Or as said by Justice Holmes in the earlier case deciding that for estate tax purposes the deduction for charitable bequests should be computed without any diminution on account of the tax itself:

> "It" (the estate tax) "comes into existence before and is independent of the receipt of the property by the legatee."
>
> *Edwards vs. Slocum*, 264 U. S. 61, 62.

It is true, due to the special wording of the section taxing powers of appointment if exercised, the property must actually pass, as the result of the exercise. But it is also necessary that the power of appointment

shall have been validly exercised, and such a subsequent compromise would not render unnecessary the determination of the question, was the power validly exercised.

The statute expressly requires both that the power be exercised, and as an additional requirement that the property pass as the result of such exercise. As said by this Court in the case affirming the necessity for the existence of this second requirement:

> "Analysis of this clause discloses three distinct requisites: (1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise."
>
> *Helvering vs. Grinnell*, 294 U. S. 153, 155.

And as said by this Court in *U. S. vs. Field* and repeated in *Crooks vs. Harrelson*, in construing another part of this same section:

> "These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause."
>
> *U. S. vs. Field*, 255 U. S. 257, 262 (1921); *Crooks vs. Harrelson*, 282 U. S. 55, 59 (1930).

Neither would a subsequent compromise prevent the property in the entire fund from having passed, within the meaning of sub-section (f), if it were found that the power had been validly exercised. Such a compromise presupposes a passage of title to all of the appointed

property of which the appointees surrender part to those who had asserted the claim that the appointment was not validly exercised. Unlike the appointees in the *Grinnell* case, *supra*, they would not have declined to accept the appointment so as to prevent its having taken effect, as the compromise presupposes acceptance.

Petitioner (p. 53) puts the supposed case that the compromise had taken the form of an agreement to probate and allow the New York will, with the brother and sisters paying over to the other interested parties a portion of the property which they would then have received under the exercise of the powers in the will, and says that had this been done it would plainly not have been the function of the Board of Tax Appeals to relieve the estate from tax, because under its own analysis of the facts and the local law the powers were not validly exercised, and that no different result should follow here because the compromise was carried out in a different form.

But if the will had been probated and sustained as a valid exercise of the power, and the compromise put in the form here suggested by Petitioner, we may well ask in return whether the Government would be satisfied with any determination that the amount of estate tax was reduced by the compromise and that the payments made by those who would then take outright under the exercise of the power, to the "other interested parties", of a portion of the property which the appointees so received under the exercise of the powers, should be considered as not having passed by exercise of the power.

If the rule of *Lyeth vs. Hoey* is applicable to such compromises, with the result that the gross estate of

the decedent is to be determined by such compromises, made long after the basic date to which estate tax is referable, then such appliction of the rule must "work both ways", whether for or against the Government (in *Lyeth vs. Hoey* it was applied for the benefit of the taxpayer); and it is obvious that the result of such compromises would be to reduce taxes in more cases than it would operate to increase them; because of the opportunity afforded to taxpayers to make and arrange compromises in such form as might be most beneficial to them, from the tax standpoint.

There have been several cases in the Circuit Courts of Appeal dealing with the application of the principle of *Lyeth vs. Hoey* to estate tax and other cases.

In *Robbins vs. Comm'r.* there had been, subsequent to the testator's death, a compromise of objections to probate of the will, allotting $250,000, or one-third of the estate to Amherst College, in pursuance of which the will had been admitted to probate with a direction that the estate be administered in accordance with the terms of the will as modified by the compromise agreement. The question was whether the amount so distributable to Amherst College should be allowed as a deduction under the clause providing for the deduction of charitable gifts.

The Court held that by the terms of the will itself there was no sufficiently definite or vested gift to Amherst College, to serve as a deduction, and discussing the decision in *Lyeth vs. Hoey,* said:

> "It may be that, by the reasoning of *Lyeth vs. Hoey,* 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119, 119 A. L. R. 410, whatever is received by Amherst under the compromise agreement would be considered as 'acquired by * * * bequest' within the

meaning of Section 22(b) (3), and thus exempt from income taxation. The fact that Amherst was named as a contingent legatee in the testator's will gave it a standing to participate in the compromise agreement. Perhaps 'acquired by * * * bequest' in Section 22(b) (3) may be read to mean acquired as a proximate result of the bequest to Amherst in the testator's will. It would not follow from this, however, that the gift which Amherst received under the compromise agreement should itself be regarded as a gift of the testator and a 'bequest' within the meaning of Section 303(a) (3). The purposes of the two sections of the Revenue Act are not identical. As we have pointed out, the estate tax is based upon the value of the interest which ceased at the time of the testator's death. 'Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries.' *Young Men's Christian Association v. Davis*, 264 U. S. 47, 50, 44 S. Ct. 291, 292, 68 L. Ed. 558."

And the opinion concludes by saying:

"Hence, it is clear that whatever rights Amherst College has now, come to it through the compromise agreement and not under the will of the testator. The compromise agreement is not the will of the testator. Obviously, to allow a deduction of the gift of $250,000 to Amherst College, or one-third of the principal of the trust fund, whichever is the lesser, upon the death of the survivor of Bertha Allen Logan and Louise Allen Atkins, is to allow a deduction not under the will of the testator but under the compromise agreement. This would not be a transfer tax on the property of the decedent at the date of his death.

It is not a deduction permissible under this statute."

Robbins vs. Comm'r, 111 F. 2d 828, 831-832 (C. C. A. 1st Circt. May 2, 1940).

White vs. Thomas was an income tax case, in which the taxpayer had received a sum in compromise of a suit against the decedent's estate based upon a claim that certain land had been given to him, prior to death, by the decedent. The taxpayer claimed that the amount received was received as "the proceeds of a gift," relying on *Lyeth vs. Hoey*. The Court held however that the principle of *Lyeth vs. Hoey* did not apply even in an income tax case, when the amount received in compromise was not a part of the thing claimed and therefore not of the same character for tax purposes as the claim which was compromised.

White vs. Thomas, 116 F. 2d 147 (5th Circt. Dec. 5, 1940);
Certiorari denied, 313 U. S. 581.

Housman vs. Comm'r. involved a claim for gift tax. A testator had left his residuary estate in trust for his wife for life with only a small provision for his sons. Many years later one of the sons demanded a third of the widow's income on the ground of an alleged constructive trust or understanding that the widow was to provide for him; and under her lawyer's advice she agreed to pay him $100,000 a year. A gift tax was assessed on the payments which she made him in 1933, which was resisted on the ground that the transaction did not constitute a gift.

The Court held that no constructive trust was sufficiently proved, and that the promise made by the widow did not impose an enforceable obligation, and that

therefore the payment was essentially donative in character. In reference to *Lyeth vs. Hoey*, which was relied upon, the Court said that the case did not apply "as the facts are quite different and the issue one of gift tax and not of income tax."

> *Housman vs. Comm'r*, 105 F. 2d 973
> (C. C. A. 2nd Circt., July 26, 1939);
> Affirming 38 B. T. A. 1007;
> Certiorari denied, 309 U. S. 656.

In an estate tax case in the First Circuit, the principal question involved was whether decedent's will operated as an execution of his general power of appointment over two trust funds; the question depending on whether a residuary clause operated as an exercise of the power, and this depending in turn on whether the law of Massachusetts or the law of California applied. It was held that Massachusetts law governed and that the power was therefore exercised.

The further question arose out of the fact that in the settlement of the estate the question whether the powers had been exercised or not had been settled by an agreement between the interested parties; and the second contention of the Executor was that in any event only so much of the trust fund should be taxed as was recognized by this settlement agreement as having been appointed.

The Court held, however, that:

> "The agreement which the parties made in settlement of the controversy, does not affect the rights of the Government under the tax statute."

> *Old Colony Trust Co. vs. Comm'r*, (1934)
> 73 F. 2d, 970, 971;
> Affirming *Vredenburg Minot Estate*, 29 B. T. A. 677.

Sage vs. Comm'r was a case involving the construction and application of the section of the law relating to the deductibility of gifts for charitable purposes, in determining estate tax. This subsection (Act of 1926, Section 303(a)(3); now Section 811(d) of the Internal Revenue Code) provides for the deduction of the amount of all charitable gifts made by will or by transfer, with the further qualification that such deductions are to be allowed "but only if such contributions or gifts are to be used * * * exclusively for religious, charitable, etc., purposes." Such deduction is therefore subject to two requirements; viz, there must be such a gift made by the will, etc.; and, secondly, as an additional requirement, that the gift is to be used by the charity exclusively for charitable purposes. If therefore the charity sees fit to appropriate part of the gift to a compromise with contesting heirs, then the gist of the decision is that the part so used is not applied to charitable purposes.

In so holding that the amount of a charitable deduction was reduced by the charity surrendering part of what was bequeathed it by the will, the Court expressly differentiated the case from one in which the amount of the gross estate was involved and said:

> "Undeniably, the estate subject to tax is the property which passes from a decedent at death. The estate tax is a tax on the transmission and not on the succession. Knowlton vs. Moore, 178 U. S. 41, 48, 49. The decedent's gross estate is therefore to be determined as of the date of his death. Ithaca Trust Co. v. United States, 279 U. S. 151, 155. But, while a decedent's gross estate is fixed as of the date of his death, deductions claimed in determining the net estate subject to

tax may not be ascertainable or even accrue until the happening of events subsequent to death. Such is the case with respect to administration expenses, which are of course an allowable deduction. It is also true with respect to deductions for conditional charitable bequests which cannot be measured until the happening of some subsequent event, or in cases where bequests to charity are in whole or in part diverted to a use for which the bequest would not be deductible had it been directly so bequeathed by the decedent. This precise situation is provided for by Treasury regulation which appropriately effectuates the administration of the cognate statutory provision. The regulation is peculiarly pertinent to the facts in the instant case."

Sage vs. Comm'r., 122 F. 2d 480 (3rd Circ.) (June 27, 1941);
Certiorari denied January 5, 1942.

Thompson's Estate vs. Comm'r., is a case dealing with the same situation as the *Sage* case, viz, whether the full amount devised to chairty should be allowed as a deduction when part of the charitable gift is surrendered in compromise by the charities.

Thompson's Estate vs. Comm'r., 123 F. 2d, 816, (2nd Circ., Nov. 17, 1941).

The other cases cited by Petitioner in support of his contention, are not, it is submitted, in point.

Benfield vs. U. S. was an income tax case, in which the question was wether an annual payment to be made to testator's widow was an annuity charged upon both income and principal of the trust, and therefore not

subject to income tax as her income, and not deductible by the trustee in its returns of income taxable to the trust; or whether it was deductible by the trustees (executors) as distributed income.

It was held that even if the will were held not to charge the allowance on principal, the heirs had by agreement made the payments to her such a charge. Being an income tax case, and the question being one of the status of her payments at the time when they were made to her, the principle of *Lyeth vs. Hoey* might have been applicable. The Court however, found that the additional amounts allowed her by the agreement of the heirs constituted merely gifts, and were therefore not taxable to her as income.

> *Benfield vs. U. S.*, 27 F. S. 56, 63 (Court of Claims, April, 1939).

Markwell's Estate vs. Comm'r. was a case in which the deductibility of a claim against the testator's estate was involved. A daughter had asserted a claim, after his death, to one-half of the estate, based upon an alleged contract to provide for her made many years before. The probate court had allowed her claim in the amount of $138,220, which the executor claimed should be deducted, for estate tax purposes, from the estate. The question was whether her claim was supported by fair and adequate consideration in money or money's worth, under Section 303 of the Act of 1926. The Court held that it was not, and merely said, in reference to *Lyeth vs. Hoey*, that if the Wisconsin decree were considered as merely entitling the claimant to a one-half distribution of the estate of decedent, there was no question as to the applicability of the estate tax laws; evidently meaning that the share

would of course be includible for estate tax purposes on that supposition.

> *Markwell's Est. vs. Comm'r.*, 112 F. 2d, 253, 255 (C. C. A. 7th Circ., May 22, 1940).

Even therefore if the sole consideration for the compromise had been the attempted appointment by the invalid New York will, it is plain, it is submitted, that tax liability under Sub-section (f) would be determined by the amount of property validly appointed, and not by such amount as might be allowed to the appointees, in a compromise. And any application of Petitioner's theory to a case in which any possible right of the attempted appointees was only one of the considerations for the compromise, presents peculiar difficulties which reflect upon the reasonableness of the whole proposition.

2. That the compromise was made and effected by the judgments of the North Carolina Court and the Maryland Court, and that both Courts in ratifying the compromise expressly decided that the attempted appointment was invalid.

How can it be said that any amounts allotted in the settlement made by the judgment, were given in compromise of claims of the brother and sisters under the New York will, when the North Carolina Court which made the compromise effective, expressly declared and decided that the attempted appointment was totally invalid; and the Maryland Court did the same?

The compromise involved the rights not only of minors, but of possibly unborn future beneficiaries interested under the limitations in the wills, and was in

substance a compromise or settlement which could only be made by the Court.

The judgment effecting the compromise, which was affirmed on appeal by the Supreme Court of North Carolina, contains the following finding:

> "That Zachary Smith Reynolds' twenty-first birthday would have occurred on November 4, 1932; that at the time of the execution of the instrument referred to in paragraph 49 the general and testamentary guardians of the said Zachary Smith Reynolds were his uncle, W. N. Reynolds, and R. E. Lasater, who were domiciled in and residents of Forsyth County in the State of North Carolina, and they continued to act and were so domiciled until the date of the death of Zachary Smith Reynolds on July 6, 1932; that the domicile of Zachary Smith Reynolds at the date of his death and at the date of the execution of the instrument referred to in Paragraph 49 was in North Carolina; that a minor is without power to establish a domicile of choice, and that marriage does not change his status; that even if Zachary Smith Reynolds had the power to adopt a domicile of choice and to execute a will in the State of New York at the date of his death, which would affect his personal estate absolutely owned, such a will would not exercise the powers of appointment under the will of his father, R. J. Reynolds, and the will and deed of his mother, Katherine S. Johnston" (R. p. 89).
>
> *Reynolds vs. Reynolds*, 208 N. C. 578, at p. 592.

It should be noted that the pecuniary legatees (by appointment) named in the New York will were par-

ties to the case and their rights were before the Court for determination.

Rec. N. C. Proceedings, pp. 82, 655.[6]

And the third paragraph of the decree of the Maryland Court affirming the compromise is as follows:

"3. That the Defendants who are named as legatees in the paper writing heretofore filed for probate in the office of the Surrogate of New York County, in the State of New York, as an alleged last will and testament of Zachary Smith Reynolds, deceased, an authenticated copy of which was filed with the Plaintiff's Bill of Complaint as Plaintiff's Exhibit H and was filed as part of the testimony in this cause, are not entitled to receive any allowance, share or payment out of either the principal or income of any of said trust estates, now in the hands of the Plaintiff as trustee; because said paper writing or alleged will was not effective or operative to dispose of or affect any of the property or estate held by the Plaintiff as Trustee under any of said instruments, but was altogether void and without effect as an exercise of any power of appointment or disposition which the said Zachary Smith Reynolds would have possessed or had, if he had attained lawful age at the time of his death; and therefore no allowance or payment shall be made to anyone as claiming

[6] The exhibit here referred to is the printed volume containing the entire record of proceedings in the North Carolina case, which was filed by stipulation (R. p. 33) in the case. Only that part of it which comprises the findings and opinion of the Supreme Court will be found in the printed record in this case (R. p. 76, etc.); but it was stipulated (R. p. 33) that reference may be made to any portion of the transcript of record which is not included in such present printed record.

under said alleged will, out of the principal or income of the estate and property held by the Plaintiff as Trustee under any of the settlements referred to in said Bill of Complaint" (R. p. 51).

The legatees under the New York will and the executor named therein were parties to this suit and their rights were before the court for adjudication.

Rec. N. C. Proceedings, p. 520, etc.;
Stipulation, R. p. 33.

The very courts therefore which effected the compromise by their judgments, expressly declared and decided that the attempted appointment was invalid.

3. That the attempted New York will was relatively not of importance as a basis for the compromise.

The standing of the New York will as a basis for recovery or compromise had been quite effectively disposed of by the North Carolina Supreme Court on the appeal in the Cabarrus County Guardianship case.

The Cabarrus County case was, it may be mentioned, a bitterly contested case, in which no concessions were made upon either side. It was a controversy between two guardians, one of whom was in favor of contesting the decree by which their ward had been excluded from further participation in these estates; and the other was opposed to such action. If the attempted will of Zachary Smith Reynolds were a valid apointment, then manifestly their ward could gain nothing by the proposed litigation, and might even incur the risk of losing what had already been set aside for her.

The principal opinion in the case (what is called the "main opinion" in the opinion in the later case; R. pp. 106, 169) was given by Judge Clarkson; and that part of it which deals with the invalidity of the attempted appointment ("the alleged will of Zachary Smith Reynolds appears to be inoperative and void," etc.) is quoted in full in the Board's opinion in this case (R. p. 18; it will be found of course in the reported case); and we will not repeat it in this brief. Moreover, the statements in the opinion, in this connection, are so manifestly correct that the invalidity of the attempted appointment was perfectly apparent, even if the Court had said nothing upon that subject.

It is suggested by Petitioner (p. 55 of Brief) that these statements represent merely the opinion of one of the five Judges who sat, because one concurred in the result, without filing an opinion, and two others filed short separate opinions concurring, while one dissented and agreed with the Court below.

Judge Stacy's concurring opinion is merely a brief summary of the grounds for reversing, and indicates no possible disagreement with the propositions laid down in the principal opinion. Judge Adams filed no opinion. It is true that Judge Brogden in his concurring opinion uses the phrase that "the New York will was not upon the lap of the Chancellor." He also, however, expresses no dissent from the self-evident propositions of law in reference to the attempted New York will, as laid down in the principal opinion.

Guardianship of Anne Cannon Reynolds II, 206 N. C. 276.

As further indicating that the New York will was relatively unimportant in the compromise, it should be

noted that in the petition submitting the proposed compromise for the approval of the Court, in which the several contentions of the different parties to the case are quite fully set forth, and the claims of the several parties stated, there is no mention of any claim under the New York will as constituting a valid appointment.

Rec. N. C. Proceedings, p. 147, etc.

On the other hand the validity of the judgment barring the Cannon child and the validity of the Reno divorce were the conditions which actually counted in the settlement. Whatever may be now suggested as to what would have been the decision upon these two questions, they presented at the time most serious questions. The judgment excluding the Cannon child was considered valid and proper not only by the prominent North Carolina lawyers who represented the parties at the time, but the Judge below in the Cabarrus County case thought it should not be attacked, and so decided or decreed and one of the Supreme Court Judges who sat on the appeal agreed with the Judge below in this respect.

What the situation before the Court and parties as to the question of the validity of the Reno divorce was, when the settlement was made, is quite apparent from the Record of that suit, which is included in full in the North Carolina Record (Rec. N. C. Proceedings, pp. 540-563); and from the account of how the divorce was obtained given by the lady chiefly concerned (do pp. 188-190), by her father (do p. 611) and by her nurse (do p. 651); all of which were before the Court when it entered the judgment effecting the settlement of these questions.

On the necessity of a bona fide domicile to the validity of a foreign divorce see:

Restatement of Conflict of Laws (Am. Law Inst.), Sec. 111, etc.;
Note, 39 A. L. R. 677;
Note, 105 A. L. R. 817.

That Zachary Smith Reynolds and those claiming under him may have been estopped by his participation, while an infant, in the case (*Restatement of Conflict of Laws*, Sec. 112), did not help those who were interested in upholding the validity of the divorce, in the litigation which resulted in the compromise. Those who were attacking the validity of the divorce, did not claim under Zachary Smith Reynolds; but under the limitations in his father's and mother's will and deed.

We do not deny that any possible claim under the New York will was included in the settlement and to that extent may be considered as one of the contributing causes, and it is true that on appeal from the judgment affirming the settlement which was resisted by some of the parties to the cause, the North Carolina Supreme Court referred to all of the matters in controversy, including the New York will, as presenting serious questions which justified the making of such a compromise. We submit however that any claims under the New York will were relatively unimportant when compared with the other elements of the controversy.

4. That the thirty-seven and a half per cent compromise share in the R. J. Reynolds Estate, of which the surviving brother and sisters were beneficiaries (and which it is now claimed was allotted in part in satisfaction of their

claims under the New York will), was allotted to be added to the shares already held in trust for them under their father's will; that is, as it would have pased under the limitations of his will in default of appointment and issue; and hence could not have been allotted in whole or in part in satisfaction of any claim under the New York will, which would have appointed the property to his brother and sisters absolutely.

It should be further noted that the thirty-seven and a half per cent share in the R. J. Reynolds estate now claimed to have been given, in whole or in part, in compromise of the New York will, was allotted to be added to the shares already held in trust for the brother and sisters under their father's will, and subject to its limitations over in case of death under twenty-eight (R. pp. 99-100); as it would have gone if Zachary Smith Reynolds had died without exercising his power and without issue, under the terms of his father's will (R. p. 61). If they had taken any share in his estate under the New York will, it would have been as outright devisees.

Manifestly therefore the allottment of this thirty-seven and a half per cent, which it is now claimed should be apportioned as partly due to the attempted New York will and partly to the other questions in dispute, could not have been made in consideration of the attempted appointment. (Compare Judge Parker's opinion, R. p. 52.)

5. That the findings of the Board of Tax Appeals are as full and specific as the nature of the case admits of; and that to remand the case to the Board for a finding of to what proportion the attempted appointment by the New

York will figured in the compromise finally arrived at, would require of the Board a task impossible of execution.

As the compromise and what might be called the negotiations leading up to it, were all matters of record the whole course of which fully appears in the transcript of the North Carolina record, and as all of these facts are found in great detail by the Board in its opinion, including findings of the questions which arose prior to the compromise, given as the Board says for the purpose of "presenting factually the state of litigation in which the property was involved" (R. p. 9), it is difficult to see what further evidence could be adduced or offered bearing upon such a question. The only conceivable additional evidence would be to call the parties who approved the compromise, or their attorneys, and ask them to what per cent any claim under the New York will figured in their minds in making the compromise. Such evidence would not we submit be relevant or admissible; nor could any more precise answer to it be given, than is indicated by the record of proceedings in the North Carolina case.

Lyeth vs. Hoey was decided several months before the first hearing of this case by the Board of Tax Appeals, and as shown by the opinion of the Board in the present case, Petitioner's claim that some part of the estate should have been treated as passing by appointment, because of the compromise, was asserted at the first hearing below (unlike his present claim as to the taxability of unexercised powers of appointment, which was only asserted on appeal). Petitioner had of course full opportunity to adduce any evidence which he might think relevant upon this question, and might have asked the Board for a specific finding of the per cent or proportion which the New York will of Zachary

Smith Reynolds contributed to the settlement (if any such finding were possible). To remand this case, which has now been pending for over four years, for the taking of additional evidence and a finding by the Board of what the "proportionate contribution" of the claims involved in the settlement, to the compromise or final settlement was, would be to require of the Board an impossible task, and would not it is submitted promote the interests of justice.

CONCLUSION.

In conclusion therefore it is submitted that neither of the two claims now asserted by the Petitioner are well founded; and that the decision of the Circuit Court of Appeals should therefore be affirmed.

Respectfully submitted,

CHARLES McH. HOWARD,
Attorney for Respondents.

March, 1942.

p. 6

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1941.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Safe Deposit and Trust Company of Baltimore, Trustee Under Wills of R. J. Reynolds and Katherine S. Johnston, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 13, 1942.]

Mr. Justice Black delivered the opinion of the Court.

Because of the importance in the administration of the Federal Estate Tax of the questions involved, we granted certiorari to review the judgment of the Circuit Court of Appeals, 121 F. 2d 307, affirming a decision of the Board of Tax Appeals, 42 B. T. A. 145.

Zachary Smith Reynolds, age 20, died on July 6, 1932. At the time, he was beneficiary of three trusts: one created by his father's will in 1918, one by deed executed by his mother in 1923, and one created by his mother's will in 1924. From his father's trust, the decedent was to receive only a portion of the income prior to his twenty-eighth birthday, at which time, if living he was to become the outright owner of the trust property and all accumulated income. His mother's trusts directed that he enjoy the income for life, subject to certain restrictions before he reached the age of 28. Each of the trusts gave the decedent a general testamentary power of appointment over the trust property; in default of exercise of the power the properties were to go to his descendants, or if he had none, to his brother and sisters and their issue *per stirpes*.

The Commissioner included all the trust property within the decedent's gross estate for the purpose of computing the Federal Estate Tax. The Board of Tax Appeals and the Circuit Court of Appeals, however, held that no part of the trust property should have been included.

I.

The case presents two questions, the first of which is whether the decedent at the time of his death had by virtue of his general powers of appointment, even if never exercised, such an interest in the trust property as to require its inclusion in his gross estate under Section 302(a) of the Revenue Act of 1926, 44 Stat. 9, 70. This section provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;"

The government argues that at the time of his death the decedent had an "interest" in the trust properties that should have been included in his gross estate, because he, to the exclusion of all other persons, could enjoy the income from them; would have received the corpus of one trust upon reaching the age of 28; and could alone decide to whom the benefits of all the trusts would pass at his death. These rights, it is said, were attributes of ownership substantially equivalent to a fee simple title, subject only to specified restrictions on alienation and the use of income. The respondents deny that the rights of the decedent with respect to any of the three trusts were substantially equivalent to ownership in fee, emphasizing the practical importance of the restrictions on alienation and the use of income, and arguing further that the decedent never actually had the capacity to make an effective testamentary disposition of the property because he died before reaching his majority.

We find it unnecessary to decide between these conflicting contentions on the economic equivalence of the decedent's rights and complete ownership.[1] For even if we assume with the government that the restrictions upon the decedent's use and enjoyment of the trust properties may be dismissed as negligible and that he had the capacity to exercise a testamentary power of appointment, the question still remains: Did the decedent have "at the time of his death" such an "interest" as Congress intended to be included

[1] In declining to pass upon this issue, we do not reject the principle we have often recognized that the realities of the taxpayer's economic interest rather than the niceties of the conveyancer's art should determine the power to tax. See Curry v. McCanless, 307 U. S. 357, 371, and cases there cited. Nor do we deny the relevance of this principle as a guide to statutory interpretation where, unlike here, the language of a statute and its statutory history do not afford more specific indications of legislative intent. Helvering v. Clifford, 309 U. S. 331.

in a decedent's gross estate under Section 302(a) of the Revenue Act of 1926? It is not contended that the benefits during life which the trusts provided for the decedent, terminating as they did at his death, made the trust properties part of his gross estate under the statute. And viewing Section 302(a) in its background of legislative, judicial, and administrative history, we cannot reach the conclusion that the words "interest . . . . of the decedent at the time of his death" were intended by Congress to include property subject to a general testamentary power of appointment unexercised by the decedent.

The forerunner of Section 302(a) of the Revenue Act of 1926 was Section 202(a) of the Revenue Act of 1916, 39 Stat. 777. In *United States* v. *Field*, 255 U. S. 257, this Court held that property passing under a general power of appointment *exercised* by a decedent was not such an "interest" of the decedent as the 1916 Act brought within the decedent's gross estate. While the holding was limited to *exercised* powers of appointment, the approach of the Court, the authorities cited, and certain explicit statements[2] in the opinion left little doubt that the Court regarded property subject to *unexercised* general powers of appointment as similarly beyond the scope of the statutory phrase "interest of the decedent."[3]

After the *Field* case, the provision it passed upon was reenacted without change in the Revenue Act of 1921 (Section 402(a), 42 Stat. 278) and in the Revenue Act of 1924 (Section 302(a), 43 Stat. 304). If the implications of the *Field* opinion with respect to unexercised powers had been considered contrary to the intendment of the words "interest of the decedent" it is reasonable to suppose that Congress would have added some clarifying amendment.

If the counterparts in the earlier Acts of Section 302(a) of the Revenue Act of 1926 did not require the inclusion of property

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[2] *E. g.*: "But the existence of the power does not of itself vest any estate in the donee." (p. 263.)

"If there be no appointment, it [the property subject to the power] goes according to the disposition of the donor." (p. 264.)

" . . . the interest in question [was] not . . . property of Mrs. Field at her death." (p. 264.)

[3] In Burnet *v.* Guggenheim, 288 U. S. 280, 288, this Court stated: "*United States* v. *Field* . . . holds that under the Revenue Act of 1916 . . . the subject of a power created by another is not a part of the estate of the decedent to whom the power was committed." It is to be noted that no distinction was recognized between exercised and unexercised powers under the rule of the Field case.

subject to an unexercised general testamentary power of appointment within the decedent's gross estate, there is no basis for concluding that the amendment of 1926 changed the act in this respect. Prior to 1926 an "interest of the decedent" was to be included in his gross estate only if subject "after his death . . . to the payment of the charges against his estate and the expenses of its administration and . . . subject to distribution as part of his estate." In the 1926 Act this qualification was abandoned. In the report accompanying the bill which embodied this change, the House Committee on Ways and Means stated only that "In the interest of certainty it is recommended that the limiting language . . . shall be eliminated in the proposed bill, so that the gross estate shall include the entire interest of the decedent at the time of his death in all the property."[4] Nothing in the report suggested that the change was intended to have any relevance to powers of appointment, and no such intention can reasonably be inferred from the amended section itself. It is noteworthy that the regulations of the Bureau of Internal Revenue issued after passage of the 1926 Act contain no indication that the Treasury Department regarded the amendment as affecting unexercised powers of appointment. On the other hand, the article pertaining to powers of appointment was reincorporated in the 1926 regulations with the same content, so far as here relevant, as the corresponding article in the last regulations issued prior to the 1926 Act.[5]

When it was held in the *Field* case that property subject to an *exercised* general testamentary power of appointment was not to be included in the decedent's gross estate under the Revenue Act of 1916, this Court referred to an amendment passed in 1919 which specifically declared property passing under an *exercised* general testamentary power to be part of the decedent's gross estate. The passage of this amendment, said the Court, "indicates that Congress was at least doubtful whether the previous act included property passing by appointment."[6] In the face of such doubts, which cannot reasonably be supposed to have been less than doubts with respect to *unexercised* powers, Congress nevertheless specified only that property subject to *exercised* powers should be included. From

[4] House Report No. 1, 69th Cong., 1st Sess., 15.

[5] Article 24 of Treasury Regulations 70 (1926 ed.) under the Revenue Act of 1926; Article 24 of Treasury Regulations 68 (1924 ed.) under the Revenue Act of 1924.

[6] United States v. Field, *supra*, 265.

this deliberate singling out of *exercised* powers alone, without the corroboration of the other matters we have discussed, a Congressional intent to treat *unexercised* powers otherwise can be deduced. At the least, Section 302(f) of the 1926 Act,[7] the counterpart of the 1919 amendment referred to in the *Field* case, represents a course of action followed by Congress since 1919 entirely consistent with a purpose to exclude from decedents' gross estates property subject to unexercised general testamentary powers of appointment.

In no judicial opinion brought to our attention has it been held that the gross estate of a decedent includes, for purposes of the Federal Estate Tax, property subject to an unexercised general power. On the contrary, as the court below points out, "the courts have been at pains to consider whether property passed under a general power or not so as to be taxable under Section 302(f), a consideration which would have been absolutely unnecessary if the estate were taxable under 302(a) because of the mere existence of a general power whether exercised or not."[8] 121 F. 2d 307, 312. In addition, the uniform administrative practice until this case arose appears to have placed an interpretation upon the Federal Estate Tax contrary to that the government now urges. No regulations issued under the several revenue acts, including those in effect at the time this suit was initiated, prescribe that property subject to an unexercised general testamentary power of appointment should be included in a decedent's gross estate. Because of the combined effect of all of these circumstances, we believe that a departure from the long-standing, generally accepted[9] construction of Section 302(a), now contested for the first time by the government, would override the best indications we have of Congressional intent.

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7 "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . .

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth;" 44 Stat. 9, 70-71.

8 See, *e. g.*, Helvering v. Grinnell, 294 U. S. 153; Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. 2d 758.

9 See I Paul, Federal Estate and Gift Taxation 425: "As long as there is no actual or constructive exercise of the power, there can be no tax under the present statute".

II.

The second question is the treatment to be given, under Section 302(f) of the Revenue Act of 1926, to a share of the trust property passing to the decedent's brother and sisters as a result of a compromise settlement with other claimants. Should that share be included in whole or in part within the decedent's gross estate as "property passing under a general power of appointment exercised by the decedent . . . by will"?

The claim of the brother and sisters was based upon: (1) a purported exercise of the power of appointment in their favor by the decedent in a will he executed in New York, and in the alternative, (2) their right to take in default of appointment under the terms of the trusts. Each of the two children of the decedent (1) denied the validity of the New York will and (2) challenging the right of the brother and sisters to take in default, independently asserted his own. These issues, complicated by many other factors which it is unnecessary here to discuss, were never finally resolved by judicial decision, although there had been much litigation involving them in the North Carolina courts. Eventually, the several claimants agreed to a compromise under which 37½% of the trust property went to the brother and sisters. The compromise was confirmed by a judgment of the North Carolina Superior Court and this judgment was affirmed by the North Carolina Supreme Court. 208 N. C. 57~~1~~ 8

The government contends that a portion of the share received by the brother and sisters reflects recognition by the other claimants as well as by the North Carolina courts of the assertion that the power of appointment was validly exercised; and that under the doctrine approved by this Court in *Lyeth* v. *Hoey*, 305 U. S. 188, that portion must be treated as though it actually passed pursuant to an effective exercise of the power.

The *Lyeth* case, like the one now before us, came to this Court after a compromise settlement. An heir of the decedent had contested the validity of the decedent's will in which no provision had been made for him. The heir and the devisees and legatees under the will entered into a compromise providing that the will be probated and that a specific sum be paid to the heir. We held that the money the heir received pursuant to the compromise should be treated, with respect to his tax liability under the federal income

tax statute,[10] as if acquired "by inheritance" for the reason that it was possible for him to receive it only "because of his standing as an heir and of his claim in that capacity."[11]

The claim of the decedent's brother and sisters here, so far as based on the validity of the purported appointment, had its roots, like the claimed invalidity of the will in the *Lyeth* case, in an issue never decided in litigation. If it had been litigated to final judgment by a competent tribunal and the brother and sisters had succeeded in establishing the validity of the exercise of the power, the inclusion in the decedent's gross estate of what they would have received as appointees, pursuant to Section 302(f), could not seriously be questioned. In the *Lyeth* case we said that "the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound."[12] There is no less reason for the same conclusion here.

The respondents contend that the principle of the *Lyeth* case, announced by the Court with respect to income tax liability, should not be controlling where, as here, the question is one of estate tax liability. It is urged that taxes should not be influenced by what occurs after the taxable event; that it is reasonable to consider a compromise *preceding* the receipt of income in connection with an income tax; but that a compromise occuring *after* the decedent's death, which is the "taxable event" under an estate tax, should not be considered. Whatever may be the general rule in this respect,[13] this Court has clearly recognized, in *Helvering* v. *Grinnell*, 294 U. S. 153, that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under Section 302(f). In that case the decedent had exercised a general testamentary power of appointment, an act which under Section 302(f) brings the property subject to the power within the gross estate. The subsequent renouncement by the appointees of the right to receive by appointment and their election to take as remaindermen in default of appointment were held by this Court to

[10] Section 22(b)(3) of the Revenue Act of 1932, 47 Stat. 178, under which the Lyeth case arose, exempted from the income tax the "value of property acquired . . . by inheritance . . . ."

[11] Lyeth v. Hoey, *supra*, 196.

[12] *Id.*

~~[13] See Ithaca Trust Co. v. United States, 279 U. S. 151, 155.~~

place the property subject to the power outside the scope of Section 302(f).

The respondents further contend that judicial determinations having been made in the state courts that the attempted appointment was invalid, the share of the brother and sisters in the compromise reflects only their alternative claim to the trust property. While there are explicit statements in the opinion of the North Carolina Superior Court that the attempted appointment was invalid, these statements must be regarded as superseded by the opinion which the North Carolina Supreme Court, whose determination constituted the final approval of the compromise, rendered on appeal. For, in the course of that opinion the Supreme Court gave clear recognition to the alleged validity of the decedent's attempted appointment as a basis of the claim the brother and sisters asserted. The court stated (208 N. C. 578, 618):

> "Serious and grave questions of law and facts were raised. The judgment sets them out and we refer to same, all troublesome, but we will consider one for example: The validity and effect of the alleged will executed in New York by Zachary Smith Reynolds, as a basis of the offer of the brother and sisters of Zachary Smith Reynolds."

Inconsistent statements made in the course of a decree issued by the Circuit Court of Baltimore, Maryland, cannot be regarded as overcoming the force of the foregoing, since the decree purported only to authorize and direct the Maryland trustee to divide the trust property in accordance with the compromise as approved in North Carolina.

How much, if any, of the 37½% going to the decedent's brother and sisters should be imputed to the claim based on the attempted exercise of the power of appointment and how much to their alternative claim we do not decide. In remanding this case to the Board of Tax Appeals for a determination of this issue, we recognize that a decision must necessarily be an approximation derived from the evaluation of elements not easily measured. In matters so practical as the administration of tax laws and in the decision of problems connected with them, a high degree of precision is often impossible to achieve. But it is far better to make such a rough estimate as the data will permit than completely to ignore the realities of the compromise because of the difficulties of evaluation.[14]

[14] Cf. United States v. Ludey, 274 U. S. 295, 302.

The judgment of the Circuit Court of Appeals is reversed with directions to remand to the Board of Tax Appeals for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1941.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Safe Deposit and Trust Company of Baltimore, Trustee under Wills of R. J. Reynolds and Katharine S. Johnston, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 13, 1942.]

The Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Byrnes concur in the opinion of the court upon the first question decided. They dissent from the decision of the second question. They are of opinion that that question should be answered in favor of the respondents on the authority of *Helvering* v. *Grinnell*, 294 U. S. 153, and that *Lyeth* v. *Hoey*, 305 U. S. 188, furnishes no support for a different answer.

The estate in question is not that of the decedent. The property is a portion of the estates of his mother and father. It is conceded that no part of either estate passed by virtue of the execution by the decedent of the powers of appointment with which he was clothed. The property passed under the deed and wills of his parents, and that passage was the taxable event. If he had voluntarily refrained from exercising the power, his estate would not have been liable to pay an estate tax for the property would then have passed from the estates of his mother and father to the distributees. But it has been decided by competent tribunals that he did not exercise the power although he attempted so to do; and, in any case there is no determination here, or elsewhere, that the power was ever exercised. This being so, the question is whether anything passed from him to his relatives under the intestate law at his death. It is plain that nothing did so pass.

In *Helvering* v. *Grinnell, supra*, the decedent exercised the power but the appointees, as was their right under state law, elected not to take under the appointment but to take as remaindermen di-

rectly from the estate of the creator of the power, and it was held that § 302 could not be invoked to impose a tax upon the estate of the decedent. It was there said:

"The crucial words are 'property passing under a general power of appointment exercised by the decedent by will.' Analysis of this clause discloses three distinct requisites—(1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise. Clearly, the general power existed and was exercised; and this is not disputed. But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the property, it could not well be said that the property had passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title, the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative."

Lyeth v. *Hoey, supra,* decides nothing to the contrary. In that case the property in question was the property of the decedent himself. He disposed of it by will. The will was contested. The contest was compromised and, as a result, those who were his heirs at law received at least a portion of that which they would have received as his heirs in the absence of a will. Thus, as a result of the compromise, property did pass from the decedent to his heirs at law and it was held that, as they were his heirs, they took by inheritance in contemplation of the Revenue Act. Here nothing passed by virtue of the exercise of the power and no portion of the decedent's estate passed under the law of descent and distribution, or as property would have passed under that law from the decedent to the beneficiaries of the compromise.

We are at a loss to understand how the Board of Tax Appeals can be permitted to find that any taxable transfer occurred within the meaning of § 302 of the Revenue Act of 1926. Moreover, the compromise was motivated by considerations other than the invalidity of the power, for the claims of the decedent's children had a large influence in bringing it about. We cannot perceive how the Board can calculate the relative weight of these conflicting claims and thus assess as taxable an apportioned part of the total amount the decedent's collateral relatives received, and thus determine what part of the property passed under the power and what part did not.